



Visa Pages: U.S. TEMPORARY FOREIGN WORKER VISAS

H-1B VISA

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The H-1B nonimmigrant visa program allows employers to hire foreign workers for specialty and professional occupations under conditions approved by the U.S. Department of Labor.

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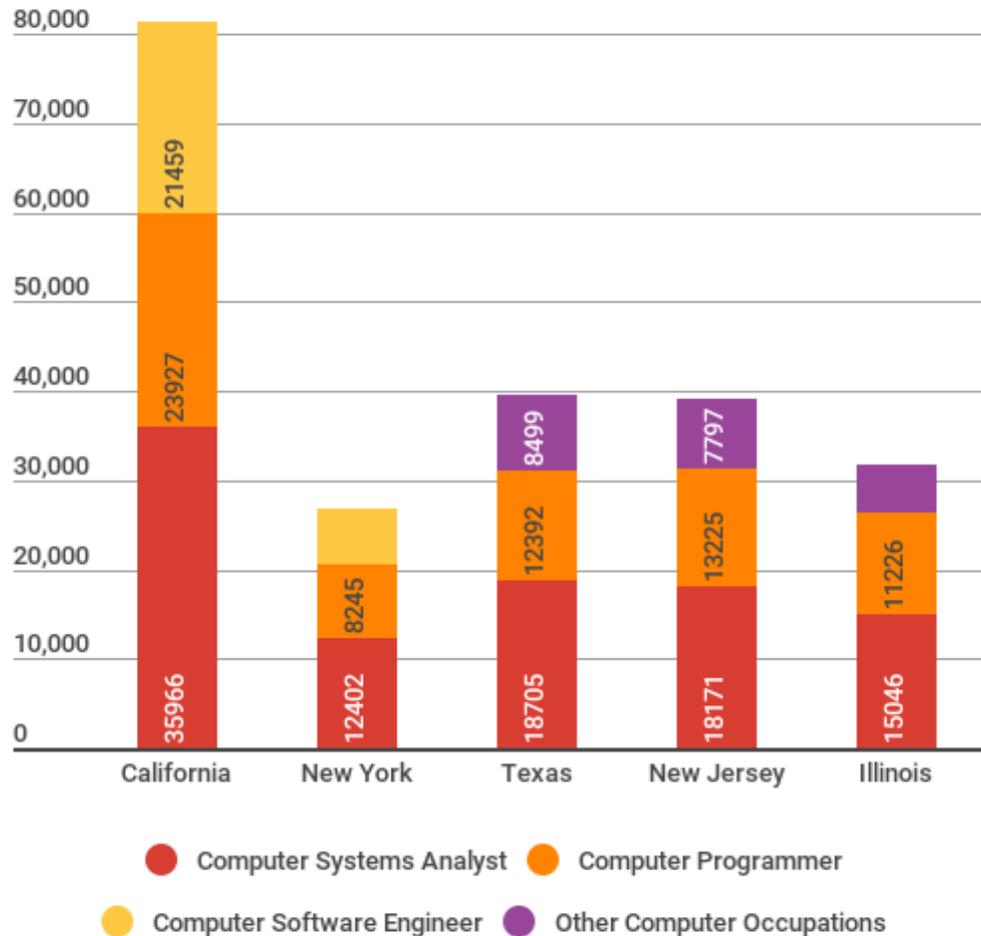
I. H1-B VISA

The H-1B nonimmigrant visa allows temporary employment of foreign workers in specialty occupations.¹ These jobs require “theoretical and practical application of a body of highly specialized knowledge, along with at least a bachelor’s degree or its equivalent in the specialization.”² As with some of the other temporary worker programs, the employer must petition the government for permission to hire H-1B workers.

The employer begins the process by filing a Labor Condition Application (LCA) with the U.S. Department of Labor (USDOL) that details the job type, length, location and salary. The salary must be the greater of either the actual wage paid to similarly situated U.S. workers or the prevailing wage determined by USDOL’s surveys of the industry. In most instances, employers do not have to make any effort to recruit U.S. workers.³ However, employers whose workforce is predominantly made up of H-1B workers and employers who have willfully violated H-1B program rules in the past are each required to attest that recruitment has occurred and that U.S. workers have not been displaced.⁴ After receiving the approved LCA, the employer files a petition for the H-1B worker with the U.S. Department of Homeland Security, U.S. Citizen and Immigration Services (USCIS). After the H-1B petition is approved, the foreign individual applies for his or her H-1B visa from the U.S. Department of State’s visa processing post abroad, which is usually the U.S. Consulate or Embassy.

Once the visa is issued, the individual seeks entry at the U.S. border or port of entry from the U.S. Department of Homeland Security, Customs and Border Patrol. Once admitted, the H-1B worker is allowed to work only for the employer who obtained USDOL and USCIS approval. There is an annual cap of 65,000 for H-1B workers, with 20,000 additional visas set aside for workers who have graduate degrees from U.S. institutions. Most H-1B jobs are in computer-related occupations and most H-1B workers come from India.

H-1B Jobs Snapshot: 2013



Source: U.S. Department of Labor, FY 2013 Annual Report, available at http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2013_Annual_Report.pdf

A. HISTORY

The H-1B visa was created with the passage of the Immigration Act of 1990.⁵ The H-1B category replaced the old H-1 category reserved for foreign individuals of distinguished merit and ability.⁶ While the old H-1 category was for the “best and the brightest” in reality the visa had devolved to “simply require that the worker be in a profession that required a Bachelor’s degree or higher.”⁷ The 1990 H-1B visa was designed to make the conditions for the visa more precise, add protections for U.S. workers, and allow H-1B workers to apply for permanent immigration status.⁸ The U.S. worker protections included an annual cap of 65,000 H-1B visas and required employers to file Labor Condition Applications (LCA) with the U.S. Department of Labor (USDOL) certifying that H-1B workers would be paid the prevailing wage.⁹ In 1991, Congress clarified that USDOL’s role was restricted to reviewing the LCA only for obvious error.¹⁰

In 1998, the H-1B visa was changed slightly after a period of intense lobbying from the computer industry, which had been a heavy H-1B user since the program's inception.¹¹ The annual cap increased to 115,000, but the program added several more U.S. worker protections. First, a subcategory of "H-1B dependent" employers were now required to recruit U.S. workers and attest that U.S. workers had not been - and would not be - displaced by foreign workers before seeking H-1Bs.¹² Furthermore, the 1998 change established H-1B user fees of \$750 to \$1,500 to fund "retraining programs" for U.S. workers and commissioned a study of discrimination against older U.S. workers by H-1B employers.¹³ In 2000 the annual cap for H-1B workers was again increased, to 195,000. This increase expired in 2003.¹⁴

The H-1B Visa Reform Act of 2004 reinstated the annual cap for new H-1B visas to 65,000 and reserved an additional new 20,000 visas for foreign workers with at least a masters degrees from a U.S. institution.¹⁵ That same legislation created a fraud prevention fee of \$500.¹⁶ There have been no significant changes to the H-1B program since 2004, although there have been many proposals under consideration as part of the movement for comprehensive immigration reform.¹⁷

DIGGING DEEPER: ROLE OF SPECIAL INTEREST LOBBYISTS IN H-1B HISTORY

The role that special interest lobbyists play in developing the H-1B program legislation and in the immigration debate at large cannot be overstated.¹⁸ Some critics accuse the technology industry of having enacted a "massive public relations campaign to implant in the American consciousness the notion that the nation was facing a severe IT labor shortage."¹⁹ Back in the year 2000, for example, in spite of evidence that there was no labor shortage,²⁰ Congress still tripled the number of available H-1B visas.²¹ H-1B program expansions were approved around the same time as the high tech job market began to collapse. Critics charge that when the technology industry saw the collapse coming they "wanted to push through this second expansion of the H-1B program at a time when it still appeared that the high-tech job market was 'hot.'"²² Members of Congress even admitted at the time that there was industry pressure to expand the H-1B program. Representative Davis (R-Va.) noted, "This is not a popular bill with the public. It's popular with CEOs . . . This is a very important issue for the high-tech executives who give the money."²³

B. DURATION

H-1B visas are initially valid for up to three years depending on the work period approved on the Labor Condition Application. H-1B workers are allowed to be in the U.S. ten days before and ten days after that work period.²⁴ Generally, H-1B visas may be extended another three years, for a total of six.²⁵ At the end of the six-year period, the worker must depart the United States unless he is eligible to change his status by applying for either another nonimmigrant visa or Lawful Permanent Residence (LPR status, also known as a "green card"). A former H-1B worker who has resided and been physically present outside of the United States for at least one year may be eligible for a new H-1B visa and another six-year period of admission to work in the United States.²⁶

C. NONIMMIGRANT INTENT NOT REQUIRED

Unlike other temporary work visas, the H-1B visa does not require nonimmigrant intent.²⁷ Prospective H-1B workers do not have to show ties to their native countries proving the intention to return home. In other words, the temporary H-1B worker may seek to permanently immigrate to the United States. Usually, if an H-1B worker later applies for LPR status based on employment, it is through the same employer that initially petitioned for the H-1B visa. It is possible, however, for a new employer to sponsor an LPR application for the H-1B worker.

1. EMPLOYMENT-BASED LEGAL PERMANENT RESIDENT STATUS

There are [five priority levels for employment-based permanent immigration](#).²⁸ The first level, known as EB-1, is reserved for the highest-skilled workers with extraordinary ability, outstanding professors or researchers, and multinational executives or managers. The second level, EB-2 is for professionals with advanced degrees or exceptional ability. The third level, EB-3 is for skilled workers, professionals or unskilled workers for jobs that are neither temporary nor seasonal. The fourth level, EB-4 is for various special immigrants specified in the regulations, including for example religious workers, broadcasters, members of the armed forces, and Iraqi/Afghan translators. The fifth level, EB-5 is for immigrants who invest a certain minimum amount of money in projects or enterprises that create U.S. jobs. Depending on the nationality of the immigrant, there may be a lengthy waiting period before an employment-based visa is available once a completed application is submitted. Two factors determine this: the priority level and the country of origin.

DIGGING DEEPER: WAIT TIMES FOR EMPLOYMENT BASED GREEN CARDS

Employment-based permanent immigration categories are numerically limited. The U.S. Department of State issues visas in the order in which the petitions were filed, until the annual limit is reached for that category. The filing date of a petition becomes the applicant's priority date. Immigrant visas cannot be issued until the priority date is reached. Visa wait times are published quarterly in the [Visa Bulletin](#).

The U.S. Department of State explains the per-country limits as follows:

*The annual per-country limitation of 7% is a cap, which visa issuances to any single country may not exceed. Applicants compete for visas primarily on a worldwide basis. The country limitation serves to avoid monopolization of virtually all the annual limitation by applicants from only a few countries. This limitation is not a quota to which any particular country is entitled, however.*²⁹

Currently, EB-2 applicants from India would have to wait about 9 years to get their green card after their application is complete. The wait time for an EB-2 applicant from China is 5 years. The wait time is commonly referred to as the "line." If an employer timely applies for an EB-2 or EB-3 visa for an H-1B worker, it is possible for the worker to extend his status as an H-1B worker for up to six years until the application for permanent residency is decided and the visa is available.³⁰

D. ANNUAL CAP ON H-1B VISAS

There is a limit to the number of new H-1B visas available each fiscal year.³¹ This numerical limit is commonly referred to as the "annual cap." In 2015, the annual cap is 65,000.³² There are, however, certain exceptions. Workers employed by an institution of

higher education, its related nonprofit entity, or a nonprofit, governmental research organization are not subject to the cap.³³ Moreover, an additional 20,000 visas are designated for workers with a U.S. master's degree or higher.³⁴

Furthermore, there is no numerical limit on H-1B visa extensions or employer changes for workers who are already in the U.S. and continuing in H-1B status.³⁵ Petitions to become a new employer of a current H-1B worker do not count against the cap either. The initial visa was already tallied as part of the cap in the first fiscal year nonimmigrant status was granted.

The annual cap has been a source of controversy since the H-1B visa was created in 1990, and has changed periodically according to Congressional action. A bill introduced in January 2015 by U.S. Senator Orin Hatch seeks to raise the H-1B visa cap to 195,000 and to eliminate a cap on people who earn an advanced degree in STEM (science, technology, math, and education) fields.³⁶ [Numerous critics](#), including U.S. Senator Chuck Grassley, have argued that bill would increase the offshoring of tech jobs and and continue to undermine U.S. workers.³⁷ However, as of November 2015, that bill has not been passed in the Senate.³⁸

H-1B Annual Cap History

	H-1B Annual Cap [1]	Law
1990-1997	65,000	Immigration Act of 1990
1998-2000	115,000	American Competitiveness and Workforce Investment Act of 1998
2001-2003	195,000	American Competitiveness in the Twenty-first Century Act of 2000
2004-present	85,000 [2]	H-1B Visa Reform Act of 2004

[1] The cap does not include extensions or employer changes for H-1B workers who are continuing their employment in the U.S. Nor does the cap include visas for H-1B workers at higher academic institutions or non-profit or government research organizations.

[2] This includes 65,000 + 20,000 for workers with U.S. graduate degrees.

1. H-1B1 VISA PROGRAM FOR CHILE AND SINGAPORE

In 2003, Congress created a new nonimmigrant classification called H-1B1, and made these visas available each fiscal year for up to 1,400 professionals from Chile and 5,400 professionals from Singapore.³⁹ The H-1B1 visas still fall within and count against the general H-1B cap and are governed by most of the same regulations.⁴⁰ While H-1B1 employers must submit an LCA to USDOL, they do not have to petition USCIS for

permission to hire H-1B1 workers. Rather, the worker presents “evidence for classification” with their visa application directly to the consular officials at the U.S. Department of State location abroad.⁴¹

E. H-4 VISA FOR DEPENDENTS

The H-4 visa category is available for spouses and minor children of H-1B workers to stay in the U.S. as long as the H-1B visa is valid. The U.S. Department of State consular official may take steps to verify that the H-1B worker is in fact maintaining his or her status in the United States before granting the family member’s H-4 visa.⁴² The family members are not generally eligible to work.⁴³ However, in February 2015 the Federal Register published a [final rule](#) from the Department of Homeland Security extending eligibility for employment authorization to select H-4 dependent spouses of H-1B visa holders. This new rule then only applies to dependents whose H-1B spouses are applying for legal permanent residency through their employer.⁴⁴

DIGGING DEEPER: NUMBER OF H-4 DEPENDENTS CONNECTED TO H-1B UNKNOWN

H-4 visas are available for spouses and children of all the classes of H workers (among them, H-1B, H-2A, and H-2B). The number of H-4 visa holders who are dependents of H-1B workers is hard to pinpoint, because the numbers do not distinguish between the different types of H visas. In 2014 there were 109,147 H-4 visas compared with 320,984 H principal visas all together.⁴⁵

II. H-1B HIRING PROCESS

Employers petition the U.S. government for permission to hire H-1B workers. The demand for H-1B visas often exceeds the number available. To make the process run more smoothly, the U.S. Department of Homeland Security's U.S. Citizen and Immigration Services (USCIS) developed an April 1 filing deadline for the visas to be issued in time for work during the upcoming fiscal year. During the past few years, the annual cap has been met within weeks of the April 1 deadline. However, prior to petitioning USCIS, employers must first submit their Labor Condition Application to the U.S. Department of Labor (USDOL). Working back from the April 1 deadline, this sets up an annual application cycle requiring recruitment of H-1B workers about a year in advance of the visa's issuance.

A. STEPS FOR EMPLOYERS

1. U.S. DEPARTMENT OF LABOR –LABOR CONDITION APPLICATION

The first step in the process is for the employer to submit the ETA Form 9035, the [Labor Condition Application](#) (LCA), to the U.S. Department of Labor's Employment and Training Administration Office of Foreign Labor Certification.⁴⁶ The LCA must be filed electronically through the [iCERT system](#) not more than six months prior to the date work will begin.⁴⁷ The LCA details the occupation category of the work, the wages, working conditions and benefits offered to H-1B workers, and information about the place(s) of employment.⁴⁸ Employers who are "H-1B dependent" or who have "willfully violated" the H-1B program have additional requirements.⁴⁹ An employer may request multiple H-1B workers on one single LCA.

A) LCA REQUIREMENTS FOR ALL EMPLOYERS

The LCA must provide the employer's name and address, and for the job itself, the wage rate, the "prevailing wage," length of employment, specific occupation code, job title, the number of workers to be hired, and all work locations. Employers attest to four requirements on the LCA.⁵⁰

- The employer will pay the beneficiary a wage which is no less than the wage paid to similarly qualified workers or, if greater, the prevailing wage for the position in the geographic area.
- The employer will provide working conditions that will not adversely affect other similarly employed workers.
- At the time of the labor condition application there is no strike or lockout at the employer place of business.
- Notice of the filing of the labor condition application with the USDOL has been given to the union bargaining representative or has been posted at the place of business.

Employers sign the LCA with the preparer, if any, and are required to give H-1B workers a copy of the LCA upon request.⁵¹

1) REQUIRED WAGE RATE

H-1B workers must receive “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or . . . the prevailing wage level for the occupational classification in the area of employment, whichever is greater.”⁵² The prevailing wage is what is “predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed.”⁵³ USDOL sets the prevailing wage for each job classification and breaks it down into four skill categories: prevailing wages rates are listed on [its website](#). Regulations direct employers to compare the established prevailing wage with the actual wage rate for that specific job; employers “must pay the H-1B worker at least the higher of the two wages.”⁵⁴ The actual wage rate can be the employer’s own salary scale – which may be variable -- and must be documented.

DIGGING DEEPER: H-1B WAGE LOOPHOLES

Numerous studies have found over the years that H-1B workers earn less than the true prevailing wage, despite the U.S. Department of Labor (USDOL) regulation’s two-pronged definition of the required wage.⁵⁵ In 2008 the U.S. Department of Homeland Security reported that 27% of H-1B violations found involved H-1B workers who did not receive the prevailing wage.⁵⁶ Some critics argue that the problem is due to loopholes in the way the law establishes the required wage for H-1B workers. First, the prevailing wage may actually be less than the market wage. This happens when the prevailing wage is not specific enough. For example, the market may place a premium on a specific programming skill, but the prevailing wage does not account for this.⁵⁷ The prevailing wage is “only defined in terms of the wage of an average worker. In other words, the employer gets a special-value worker for the price of an average one, and thus for less than what a similar special-value American worker would be paid.”⁵⁸ Stated differently, USDOL’s prevailing wage assessment is based on the requirements of the job rather than an individual H-1B worker’s qualifications.⁵⁹ Second, the actual wage -- the amount paid to a similarly situated U.S. worker -- is meaningless in many companies where there are simply no similarly situated U.S. workers.

DIGGING DEEPER: TAXES

H-1B workers are subject to employment payroll taxes and are eligible for Social Security benefits. They also usually pay state and federal income taxes, depending on whether they are categorized for tax purposes as either **non-resident aliens** or **resident aliens**. A non-resident alien is only taxed on income earned in the U.S., while a resident alien pays tax on income earned both inside and outside the United States. The Internal Revenue Service [publishes guidance](#) for nonresident aliens because federal tax rules are complicated and depend on each worker’s situation.

2) U.S. WORKER RECRUITMENT NOT REQUIRED

The general rule is that employers [do not have to test the U.S. labor market](#) as part of the LCA process. Employers do not have to advertise the position or recruit U.S. workers. The U.S. Department of Justice has opined that this is problematic and that employers who seek to hire an H-1B worker should first “be required to ‘test’ the labor market to determine whether qualified U.S. workers are available and to hire any equally or better qualified U.S. workers who apply.”⁶⁰

(a) Super Penalty: No U.S. worker displacement

Regulations pertaining to the LCA process do not explicitly prohibit U.S. worker displacement. However, the enforcement section of the regulations does set out what is known as a **super penalty** when U.S. workers are displaced. Any employer who displaces a U.S. worker in the period beginning 90 days before and ending 90 days after the filing of an H-1B petition and is also found to have willfully violated the terms of the LCA or misrepresented a material fact on the LCA is subject to a maximum penalty of \$35,000 per displacement.⁶¹

Notwithstanding this rule, however, it is commonly accepted as fact that U.S. workers have been displaced by H-1B nonimmigrants.⁶² For example, in the **2015 case** of Southern California Edison, U.S. workers were asked to train their H-1B replacements from India.⁶³ While there have been reports of U.S. worker displacement, it is unclear how often the super penalty has been imposed, if ever.

B) LCA REQUIREMENTS FOR H-1B DEPENDENT EMPLOYERS AND WILLFUL VIOLATORS

Labor condition applications submitted by employers who are either dependent on H-1B workers or found to have willfully violated the program in the past are subject to additional requirements related to U.S. worker recruitment and non-displacement.⁶⁴ A dependent employer is defined as an employer with a certain number of H-1B workers.⁶⁵ The test is based on a sliding scale comparing the number of H-1B and total workers with the employer. A willful violator is an employer who the USDOL has found to have willfully violated the H-1B program rules within five years of filing the LCA. Only about three to five percent of employers fall into these two categories.⁶⁶

H-1B Dependent Employer Rule

	If size of total workforce....	And size of H-1B workforce...	Then...
Option one	25 or fewer total workers	8 or more H-1B workers	Dependent Employer
Option two	26-50 total workers	13 or more H-1B workers	Dependent Employer
Option three	51 or more total workers	15% of total workers are H-1B	Dependent Employer

Source: See 8 U.S.C. § 1182(n)(3)(A).

1) U.S. WORKER RECRUITMENT AND PROHIBITION ON DISPLACEMENT

H-1B dependent employers and willful violators must show no displacement of U.S. workers in similar occupations, either 90 days before or 90 days after filing the LCA. If the H-1B worker is employed at a third party worksite, the petitioning

employer must ensure that the third-party employer neither displaced nor intended to displace a U.S. worker during that same period.⁶⁷

Additionally, the LCA requires dependent employers and willful violators to make good faith efforts to recruit U.S. workers and offer the job to anyone “who applies and is equally or better qualified for the job.”⁶⁸ However, these employers merely “attest, rather than demonstrate, that they took good faith steps to hire a U.S. worker.”⁶⁹

DIGGING DEEPER: SMALL NUMBER OF DEPENDENT EMPLOYERS AND WILLFUL VIOLATORS

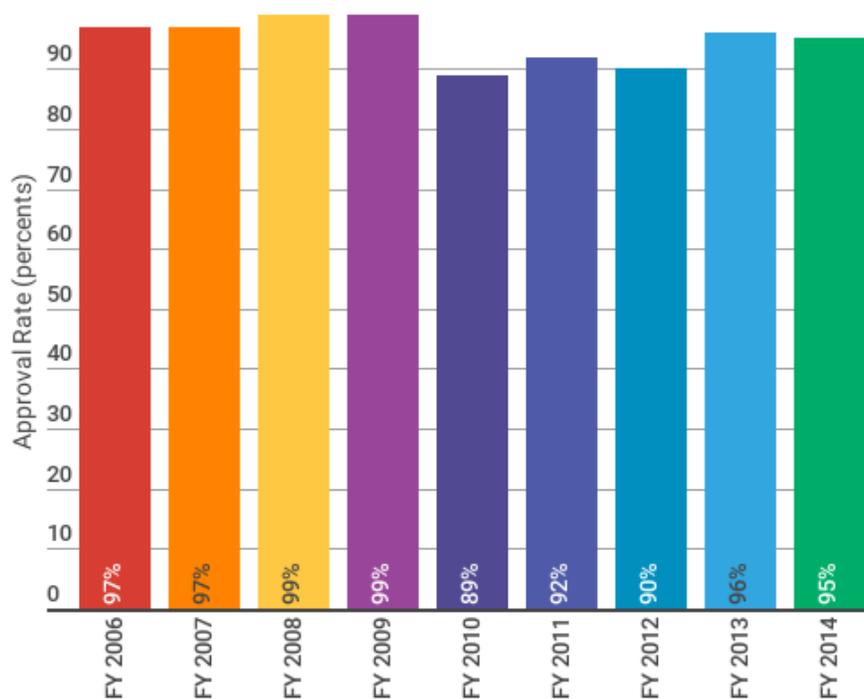
One of the reasons that so few employers are classified as H-1B dependent employers is due the simplistic calculation presented in the regulations. H-1B workers are not grouped by occupation to determine if an employer is dependent. Instead, the number of H-1B workers is compared to “the employer’s total workforce.”⁷⁰ For example, the number of H-1B software developers at a company is compared with the total number of employees, including administrative staff and workers in other departments - not just software developers. Furthermore, H-1B workers with graduate degrees or who are paid an annual salary of at least \$60,000 are not counted in the calculation.⁷¹

An employer is branded as a “willful employer” by USDOL after an enforcement action. According to online data, as of December 2014, the agency had classified just under 50 employers (including affiliates and officers) as willful violators of the H-1B program.⁷² Given that there are several hundreds of thousands of LCAs submitted annually, this is a very small fraction.⁷³

C) LABOR CONDITION APPLICATION - STANDARD OF REVIEW

USDOL only reviews the Labor Condition Application (LCA) for basic compliance with the instructions; there is not much scrutiny.⁷⁴ Generally, USDOL has no authority to verify whether the information submitted is accurate.⁷⁵ Nevertheless, employers must have proof on hand to support the legitimacy of the LCA and maintain a public access file with critical supporting documents.⁷⁶ At one point in 2003, the Inspector General (IG) found that USDOL added “nothing substantial” to the LCA review process.⁷⁷ Six years later, the IG once again pointed out that the agency’s limited power “amounts to a review function without any meaningful impact.”⁷⁸ Indeed, the vast majority of applications are approved. From 2006 to 2009, the approval rate for positions certified hovered around 98%, then it dropped to 89% in 2010.⁷⁹ In 2014, the approval rate was 95%.⁸⁰

H-1B Labor Condition Applications USDOL Approval Rate



*Approval Rate = Positions Certified / Positions Requested.

Source: U.S. Department of Labor, 2011 Annual Report, available at

<http://www.foreignlaborcert.usdoleta.gov/performance/cfm>. U.S. Department of

Labor, 1B Temporary Visa Program – Selected Statistic FY 2012, available at

http://www.foreignlaborcert.doleta.gov/pdf/h_1b_temp_visa_2012.pdf. U.S. Department of

Labor, H-1B Temporary Specialty Occupations Labor Condition Program – Select

Statistics, FY 2013, available at http://www.foreignlaborcert.doleta.gov/pdf/Statistics_

FY%202013_YTD_Q4_final.pdf. U.S. Department of Labor, H-1B Temporary Labor

Specialty Occupations Labor Condition Program – Select Statistics, FY 2014, available at

http://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q4.pdf. U.S.

Department of Labor, Annual Reports (2006-2012), available at

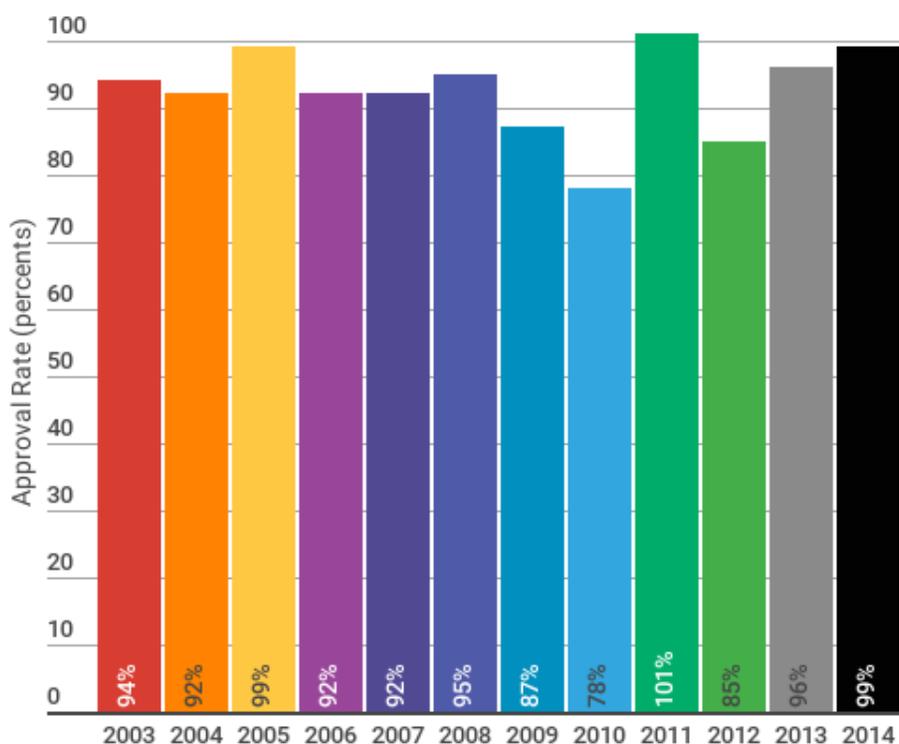
<https://www.foreignlaborcert.doleta.gov/performance/cfm>.

2. U.S. DEPARTMENT OF HOMELAND SECURITY – FORM I-129

After the LCA is approved, the employer submits it along with the [Form I-129](#) Petition for a Nonimmigrant Worker, to the U.S. Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS). The H-1B petition must also include a copy of the written contract between the employer and the worker beneficiary or a summary of the terms of an oral agreement if there is no written contract.⁸¹ H-1B petitions are mailed to one of the USCIS Service Centers for processing. Upon receipt, the USCIS clerk creates the official file of record for the petition.

Each potential H-1B worker is individually named in the application.⁸² The worker's biographical data -- name, date of birth, gender, and country of birth -- is listed on the Form I-129. The file is assigned to an adjudicator who decides if there is enough information in the file to approve or deny the petition, or whether more evidence is needed. If the adjudicator needs more information, a request for evidence is sent to the petitioning employer including a deadline for a response. After petitions are adjudicated, the decision is entered into the computer tracking system and if approved, the visa is ready for consular processing. Historically, USCIS, much like USDOL, has had a high approval rate for nonimmigrant petitions, with a slight dip in 2010.⁸³ In 2014, the approval rate was 99%.⁸⁴

H-1B Nonimmigrant Petitions (I-129) Approval Rate by USCIS



*Approval rate = petitions approved / petitions filed.

**The percentage for 2011 is over 100% because the figures represent all petitions approved in the particular fiscal year regardless of whether the petition was filed in the same or in a previous fiscal year. For that reason, in 2011 more petitions were approved (269,653), than were filed (267,653).

Source: Source: U.S. Department of Homeland Security, USCIS, Annual Characteristics Reports, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD>.

A) FEES

Employers pay fees to USCIS along with Form I-129.⁸⁵ At a minimum, there is a \$325 filing fee and \$500 anti-fraud fee. There are additional fees of \$750 to \$1,500 for retraining U.S. workers and \$2,000 for employers with 50 or more workers in the U.S. and if more than 50% of the workers in the U.S. are in H-1B or L-1 immigrant status.⁸⁶ There are exemptions to some of these fees; the exemption supplement determines the final amount paid.⁸⁷

H-1B program fees are the employer's responsibility and the cost should not be shifted to the workers.⁸⁸ The statute governing the program even explicitly mentions that the fraud prevention fee is to be paid by the employer.⁸⁹ Moreover, H-1B regulations clarify that "program costs and fees" are the employer's business expenses and as such, are the employer's responsibility.⁹⁰ An employer may only request an H-1B worker to pay its business expenses when it does not result in the worker earning less than the required wage when it is due.⁹¹ Because the required wage must be paid free and clear, an employer violates the regulations when it makes the worker pay for its business expenses and it reduces their wages below the required amount.⁹²

B) EXTENSIONS AND CHANGES FOR CURRENT H-1B WORKERS

An employer may apply for an extension of their worker's visa before it expires as long as there is a currently valid LCA or a new one is filed with USDOL.⁹³ Workers may transfer to a job with a different employer as long as the new employer also files an LCA and then a Form I-129 with USCIS prior to the expiration of the original visa.⁹⁴ H-1B workers do not need U.S. Department of State approval once they are already lawfully present in the U.S. with a valid H-1B visa. Only the USDOL and USCIS are involved with extensions and changes to visas already issued.

3. THIRD PARTY WORKSITES AND THE "BODY SHOP" EMPLOYER

Some H-1B workers are employed at a third party worksite that is not owned, operated or controlled by the employer.⁹⁵ In those situations, the petitioning employer who submitted the LCA and Form I-129 to the government on behalf of the H-1B worker is in the role of a middleman or staffing company, what has been commonly referred to as a "body shop." Several of the leading Information Technology (IT) companies routinely place thousands of their H-1B workers at third-party worksites instead of at their own places of business.

This practice has led to ongoing problems.⁹⁶ USDOL has reported that staffing employers were a significant source of wage and hour complaints: "nearly all of the complaints" in the agency's Northeast region office "involve staffing companies" and "the number of complaints is growing."⁹⁷ Moreover, a 2011 Government Accountability Office report found that "the H-1B program lacks a legal provision for holding employers accountable to program requirements when they obtain H-1B workers through a staffing company."⁹⁸

USCIS has issued guidance to the adjudicators who decide H-1B petitions to ensure a bona fide employer-employee relationship between the petitioner and the beneficiary.

Placement of H-1B workers in third-party jobs is only allowed when that initial employment relationship is maintained.⁹⁹ The guidance - known as the [Neufeld memo](#) – specifies criteria for a valid employer-employee relationship and focuses on the overarching question of whether the petitioning employer has the “right to control” its H-1B worker. Ensuring a valid employer-employee relationship, it was thought, would curtail the exploitation of H-1B workers who were placed by employers at third party worksites.

Before signing off on an H-1B petition, [USCIS evaluates the detailed facts](#) that must be revealed on the Form I-129, such as whether the foreign national will work off-site, who will supervise the H-1B worker on a daily basis, when and how that supervision will take place, who has the authority to hire, pay, evaluate, and fire the worker, and if the employer “will maintain a valid employer-employee relationship with the beneficiary at all times.” Furthermore, each third party worksite must have been listed on the LCA submitted to USDOL.

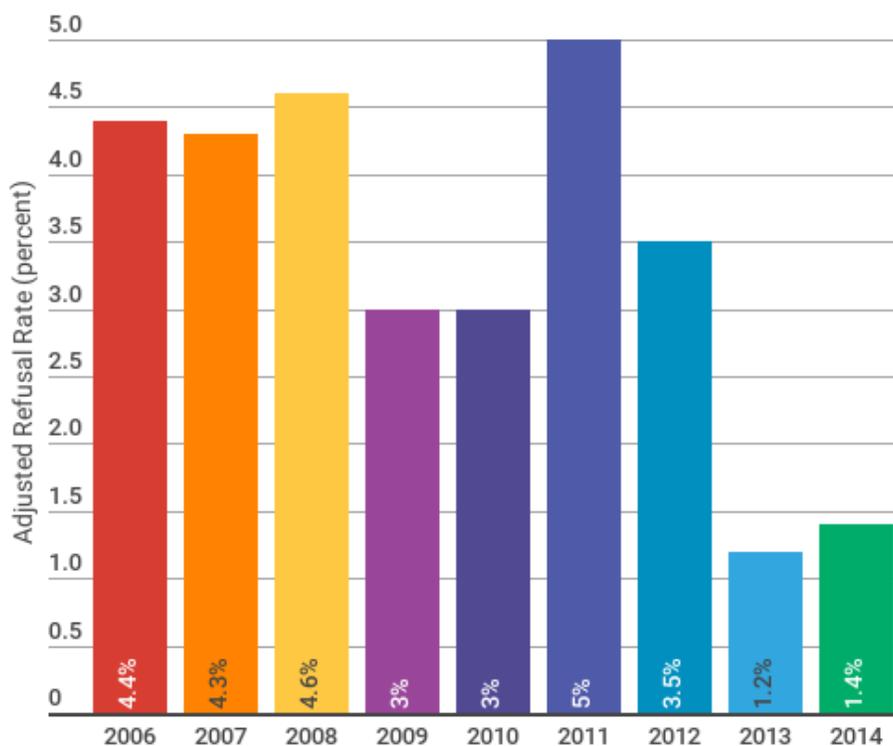
B. STEPS FOR WORKERS

Employers find foreign workers in many ways, through, for example, their own advertisements and marketing, the worker’s academic institutions, or third-party recruiters. A prospective H-1B worker will usually apply for the job while abroad. They may have to attend a recruitment meeting or a training program. Interviews with the U.S. employer may either be in person if the employer travels abroad or via video or teleconference.¹⁰⁰ H-1B program regulations do not require that foreign workers receive any written disclosures setting forth terms and conditions of employment prior to being offered an H-1B job. A formal employment contract is not required.

When the worker is hired and the employer’s LCA is approved by USDOL, the employer names the worker as the beneficiary on the nonimmigrant petition submitted to USCIS. After approval, the prospective H-1B worker applies for the actual visa at a U.S. Department of State embassy, consulate or visa processing post abroad. There is no fee at this stage. At the visa interview, the prospective H-1B worker should receive the U.S. Department of State’s anti-trafficking [brochure](#).

The consular post will verify that the petition has been approved for the worker by checking the computerized Petition Information Management System.¹⁰¹ USDOL and USCIS approval usually guarantee that the visa application will be accepted unless the consular official obtains new evidence or finds clear error.¹⁰² Indeed, the adjusted refusal rate for H-1B visas has been 5% or less for the last nine years.¹⁰³

H-1B Visas Approved by State Department Adjusted Refusal Rate



Source: Adjusted Visa Refusal Rate = (Refusal – Overcome) / ((Refusal-Overcome) + Issuances). See U.S. Department of State, Guidelines of the Visa Waiver Program, available at [http://www.travel.state.gov/pdf/refusalratelanguage .pdf](http://www.travel.state.gov/pdf/refusalratelanguage.pdf). U.S. Department of State, Nonimmigrant Visa Statistics, NIV Workload by Category, 2006-2014, available at http://www.travel.state.gov/visa/statistics/niv_stats/nivstats_4582.html. U.S. Department of State, Nonimmigrant Visa Statistic, Worldwide NIV Workload by Visa Category FY 2013, (Q1-Q3 only), available at <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2013NIVWorkloadbyVisaCategory.pdf>. U.S. Department of State, Nonimmigrant Visa Statistic, Worldwide NIV Workload by Visa Category FY 2014, (Q1-Q3 only) available at <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2014NIVWorkloadbyVisaCategory.pdf>

The final step for workers is to apply for admission to the U.S. at the border or port of entry. A visa does not guarantee admission to the United States. The U.S. Department of Homeland Security's Customs and Border Protection will either permit or deny entry after their own inspection and will determine the permitted time allowed in the U.S.,

which may be less time than what is listed on the visa itself.¹⁰⁴ Workers may depart and re-enter the U.S. with the same H-1B visa without limitation until the visa expires.

1. RECRUITMENT ABROAD

H-1B workers may find out about jobs in the U.S. through third party recruiters. These recruiters may be individuals or business entities and may be based either in the U.S. or abroad. As with other nonimmigrant visa programs, there is a risk that recruiters may inaccurately represent the job, or make false promises. There are no H-1B regulations that pertain to recruiters specifically. There is a rule prohibiting employers from shifting any of the H-1B program costs and fees to the workers.¹⁰⁵ However, even so, it is not uncommon for third party recruiters to make prospective H-1B workers pay fees in order to apply for the job.¹⁰⁶ An employer should be on notice of these illegal transactions if the recruiter handling the immigration paperwork tells the employer that its participation is “reduced rate” or free. In fact, if the employer pays less than the fees enumerated on the USCIS website, it is possible that the recruiter has unlawfully shifted those costs of the program to the workers.¹⁰⁷

III. H-1B WORKERS IN THE U.S. – DATA

Each of the agencies involved with administering the H-1B program maintain and publish data about H-1B workers in the United States. However, each data set is only pertinent to that specific agency's function. No single agency can tell us how many H-1B workers are present in the U.S. at any given time, for example. Viewing the data together and taking each source into context, though, does provide a clearer picture of the H-1B workforce. Because the program is annually capped, Congress requires both the U.S. Department of Homeland Security and the U.S. Department of Labor to issue quarterly and annual reports detailing the program. As such, the government publishes more information about the H-1B visa than any of the other other nonimmigrant programs.

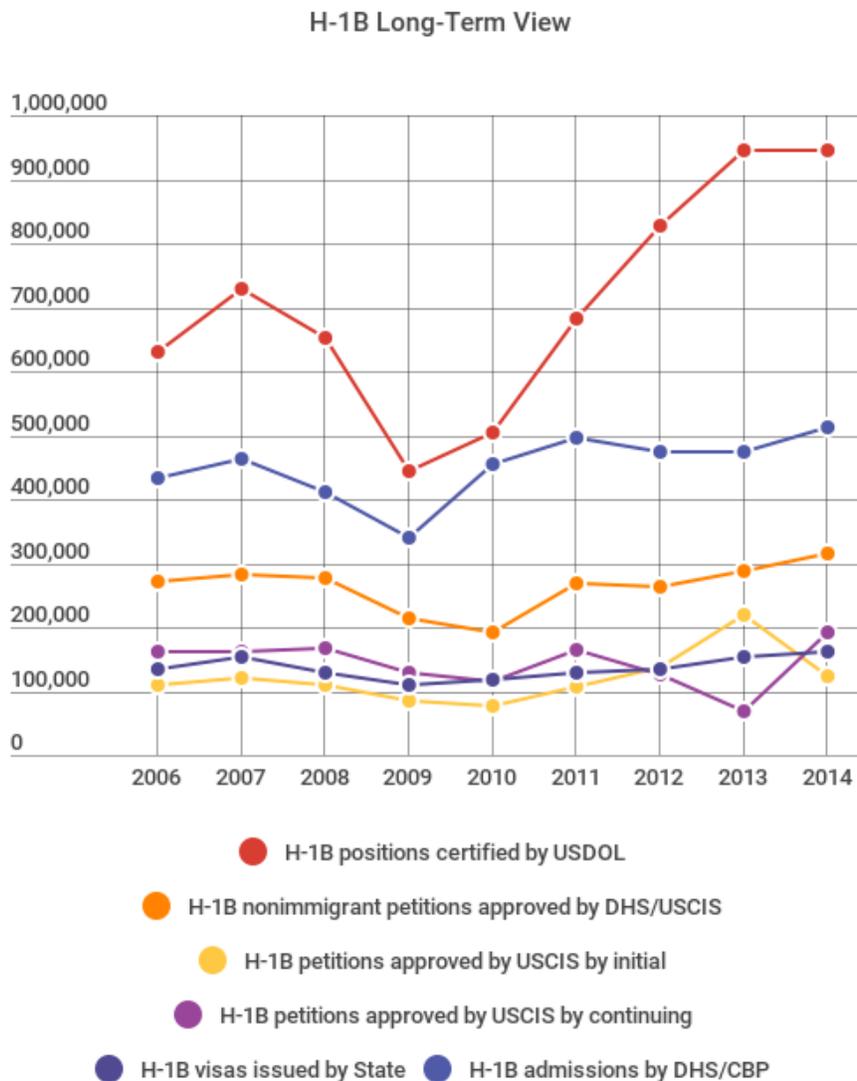
Most H-1B workers are Indian and Chinese and are employed in the computer and information technology industries (IT). While media reports have made this abundantly clear, none of the available data itself is broken down enough to determine the nationalities of H-1B workers employed in specific industries. Indeed, H-1B workers come from all over the world and work in a wide variety of industries and professions. Nonetheless, across nationality and job type, data suggests that many H-1B workers are paid less than their U.S. counterparts.¹⁰⁸

H-1B Numbers at a Glance: 2011-2014

Agency	Data collected	FY 2013	FY 2012	FY 2011
U.S. Department of Labor	Number of H-1B positions requested on Labor Condition Application	944,842 H-1B jobs certified	847,959 H-1B jobs certified	682,048 H-1B jobs certified
U.S. State Department	Number of H-1B visas actually issued to foreign workers at US Consulates abroad	153,223 H-1B visas granted	135,530 H-1B visas granted	129,134 H-1B visas granted
U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services	Number of H-1B worker beneficiaries on Form I-129 Petitions	286,773 worker beneficiaries granted H-1B status includes:	262,569 worker beneficiaries granted H-1B status includes:	269,653 worker beneficiaries granted H-1B status includes:
		219,147 initial	136,890 initial	106,445 initial
		67,626 continuing	125,679 continuing	163,208 continuing
U.S. Department of Homeland Security – U.S. Customs and Border Patrol	Number of H-1B admissions and readmissions at the border with a I-94 entry document	474,355 admissions counted for individuals with H-1B visas	473,015 admissions counted for individuals with H-1B visas	494,565 admissions counted for individuals with H-1B visas

Sources: U.S. Department of Labor, 2011 Annual Report, available at <http://www.foreignlaborcert.doleta.gov/performance/cfm>. U.S. Department of Labor, 2012 Annual Report, available at http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012_Annual_Report-11-29-2013-Final%20Clean.pdf. U.S. Department of Labor, 2013 Annual Report, available at http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2013_Annual_Report. U.S. Department of State, FY 1997-2014 NIV Detail Table, available at http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html. U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2011 Annual Report, available at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-11-characteristics.pdf>. U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2012 Annual Report, available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-12-characteristics.pdf>. U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report, available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2013_H-1B_Petitions_Report_326.pdf. Randall Monger, U.S. Department of Homeland Security, Office of Immigration Statistics, Nonimmigrant Admissions to the United States: 2011, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2011.pdf. Randall Monger, U.S. Department of Homeland Security, Office of Immigration Statistics, Nonimmigrant Admissions to the United States: 2012, available at https://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf. Katie Foreman and Randall Monger, U.S. Department of Homeland Security, Office of Immigration Statistics, Nonimmigrant Admissions to the United States: 2013, available at http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf.

A. NUMBER OF H-1B WORKERS IN THE U.S.



Sources: U.S. Department of Labor, Office of Foreign Labor Certification, available at <http://www.foreignlaborcert.USDOLEta.gov/performance/cfm>. U.S. Department of Homeland Security, USCIS, Annual Characteristic Reports, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD>. U.S. Department of State, FY 1997-2014 NIV Detail Table, available at http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html. U.S. Department of Homeland Security, Office of Immigration Statistics, Annual Non-immigrant Flow Reports, available at <http://www.dhs.gov/yearbook-immigration-statistics>.

1. U.S. DEPARTMENT OF LABOR

The U.S. Department of Labor (USDOL) maintains a [quarterly count](#) of H-1B workers sought based on information in the Labor Condition Applications (LCA). In 2014, the USDOL certified 946,293 positions for H-1B workers on LCAs.¹⁰⁹ This number is higher than the annual cap because it includes certifications for both initial H-1B workers and those already in the U.S. who are continuing their employment. Furthermore, there may be several LCA positions certified for one single worker. This is because when H-1B workers are employed in different locations or worksites, or when a worker's job is changed or extended, the employer must submit a new LCA. Additionally, LCAs are submitted for all H-1B workers, even those exempt from the cap, such as employees of academic institutions and government and nonprofit research centers. USDOL's Office of Foreign Labor Certification files an [annual report](#) detailing the several nonimmigrant work visas in its charge, including H-1B.

2. U.S. DEPARTMENT OF STATE

According to the U.S. Department of State, in 2014, there were 161,369 new H-1B visas issued to foreign workers.¹¹⁰ This number does not count the workers who entered with H-1B visas in previous years and extended their stay into the present year.

3. U.S. DEPARTMENT OF HOMELAND SECURITY

The U.S. Department of Homeland Security (DHS) has two agencies involved in the H-1B program and thus two sets of data pertaining to the number of H-1B workers. The U.S. Citizenship and Immigration Services (USCIS) receives the petition for nonimmigrant status, Form I-129, submitted by the employer or agent. At the border or port of entry, the Customs and Border Patrol (CBP) interviews workers who have received H-1B visas, decides whether to grant their admission, and issues the I-94 entry document.

A) U.S. CITIZENSHIP AND IMMIGRATION SERVICES

In 2014, USCIS approved nonimmigrant status for a total of 315,857 beneficiaries on Form I-129s.¹¹¹ This number is broken down to 124,326 new H-1B workers and 191,531 individuals who were continuing their stay as H-1B workers.¹¹² Because there is a limit to the number of H-1B visas that may be issued each year, USCIS distinguishes between initial petitions (that are counted against the cap) and petitions to extend employment (which are not counted against the cap). USCIS is required by statute to submit annual reports to Congress on [H-1B petitions filed](#) and [characteristics of H-1B workers](#).¹¹³

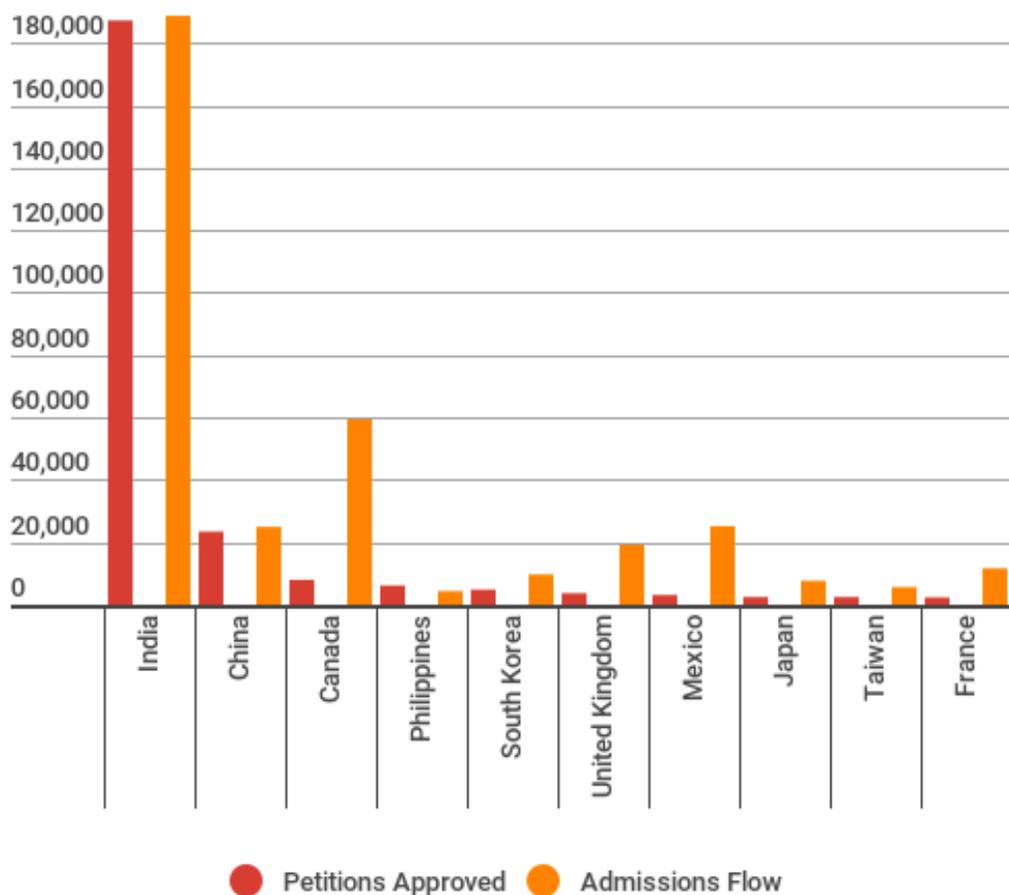
B) U.S. CUSTOMS AND BORDER PATROL

Each time a nonimmigrant worker enters the United States, Customs and Border Patrol (CBP) counts the entry as an admission. The number of admissions of individuals with H-1B visas is published annually.¹¹⁴ CBP reported 474,355 H-1B admissions in 2013.¹¹⁵ The way the data is collected does not distinguish between the first and return entries; all are counted as separate admissions.¹¹⁶ Therefore, the number refers to admissions rather than individuals. Departures are not tracked.¹¹⁷ CBP numbers indicate

which type of immigration accounts for traffic at the border, not how many H-1B workers are in the U.S. each year.

B. H-1B WORKER DEMOGRAPHICS

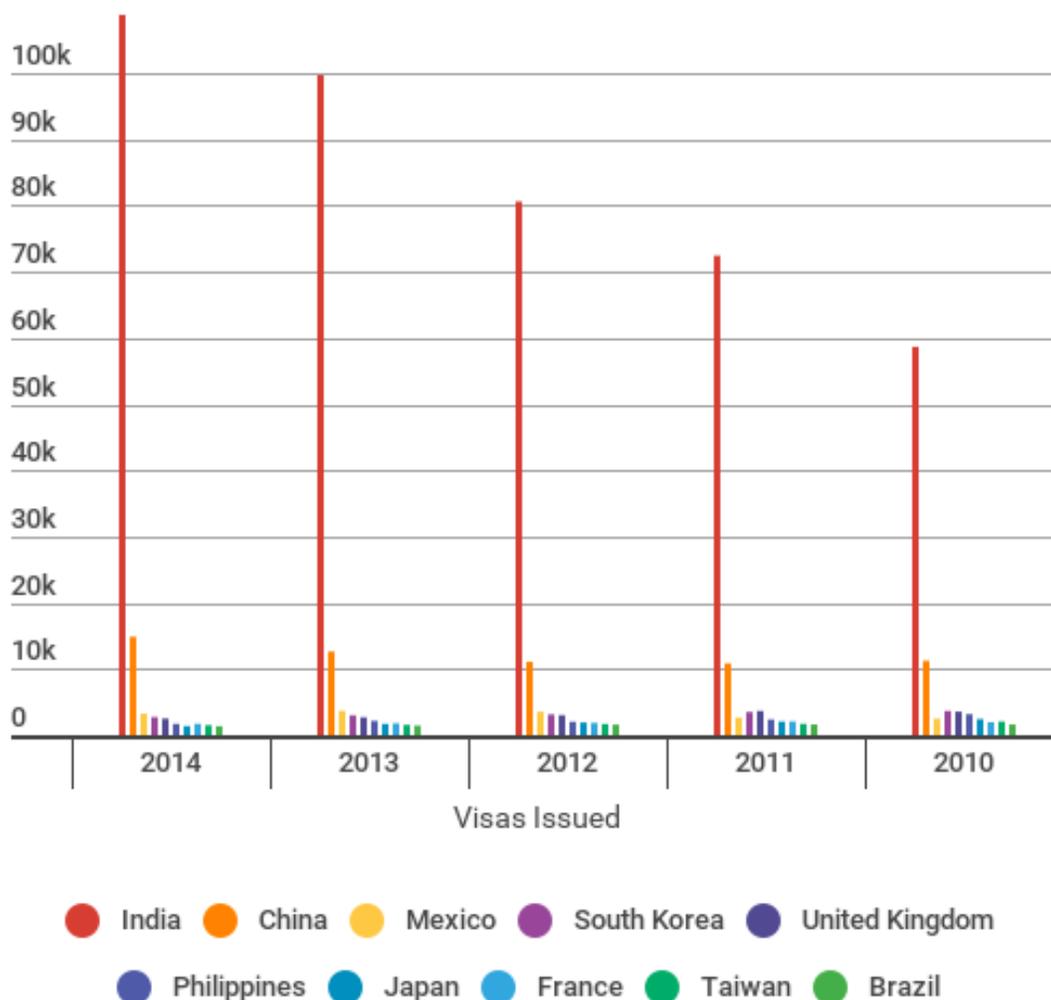
Top Ten Sending Countries: H-1B Workers by Nonimmigrant Petitions Approved and Admissions Flow - 2013



Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report, available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/H-1B_Characteristics_Report_FY_2013_826_KB.pdf. The numbers include nonimmigrant petitions for both initial and continuing employment. U.S. Department of Homeland Security, Office of Immigration Statistics, Supplemental Data Tables on Nonimmigrant Admissions by Selected Category of Admission and Country of Citizenship, available at <http://www.dhs.gov/yearbook-immigration-statistics>.

1. NATIONAL ORIGIN

Top Ten Sending Countries: H-1B Visas Issued



Source: U.S. Department of State, FY 1997-2014 NIV Detail Table, available at http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html

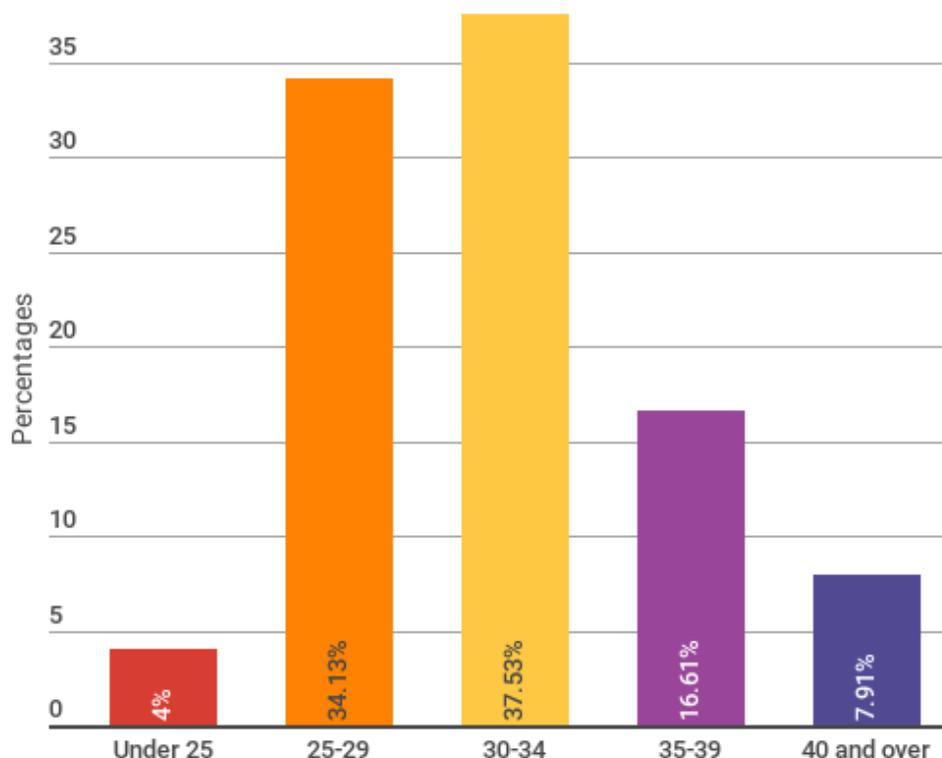
While H-1B workers come to the U.S. from all over the world, most come from Asia.¹¹⁸ For nearly a decade, the vast majority of workers have been from India. For the last several years, more than 60% of all H-1B visa petitions approved by USCIS were for Indian workers.¹¹⁹ The country with the second-most beneficiaries has been China, but with less than 10% of all H-1B visa petitions granted.¹²⁰ When looking at the three data sources tracking the national origin of H-1B workers, it is clear that the top ten sending countries for H-1B workers have remained stable over the past several years.¹²¹ There have, however, been some slight changes. For example, since 2010, the number of H-

H-1B workers from Mexico has increased and the number of workers from Taiwan has decreased.¹²² Even so, the numbers of individuals from other countries pales in comparison to India, which sends more H-1B workers than all other nations combined.

2. AGE AND EDUCATION

In 2014, 92.27% of all H-1B workers were 39 years old or younger.¹²³ A Government Accountability Office study from 2011 evaluated data from 2008 found that in some H-1B “heavy” occupations like computer processing, the H-1B workers were younger and more educated than their U.S. counterparts.¹²⁴

H-1B Workers Age Range - 2014



Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report at p. 9 (March 24, 2014), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/H-1B_Characteristics_Report_FY_2013_826_KB.pdf; Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report, available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2014_H-1B_Petitions_Report_SIGNED.pdf.

DIGGING DEEPER: NO GENDER DATA AVAILABLE

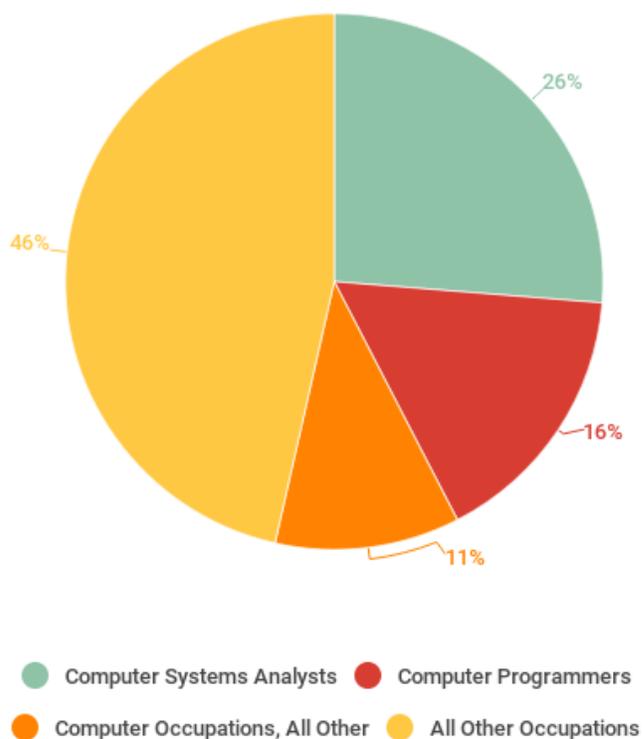
A spokesperson for the U.S. Department of Homeland Security has stated that gender data for H-1B workers is not readily available because gender is not taken into account when deciding who qualifies for the program.¹²⁵ However, the U.S. Department of Homeland Security's U.S. Citizenship and Immigration Services knows the gender of every H-1B worker because that information is listed on the petition for nonimmigrant worker (Form I-129) that is submitted by the employer for each individual worker. Unlike H-2 workers, H-1B workers must be individually named and biographical information submitted at that stage of the application process. The lack of public information on the gender of H-1B workers is a glaring omission given the extensive details contained in USCIS's annual Characteristics Report. Furthermore, when each worker applies for his or her visa through DOS, the worker's gender is noted on the application. However, DOS does not publish data on the gender of H-1B workers.

C. H-1B JOB CHARACTERISTICS

1. COMPUTER RELATED JOBS PREDOMINATE

Computer-related and information technology occupations (IT) are the most common type of jobs in the H-1B program.¹²⁶ This has been the case almost since its inception.¹²⁷

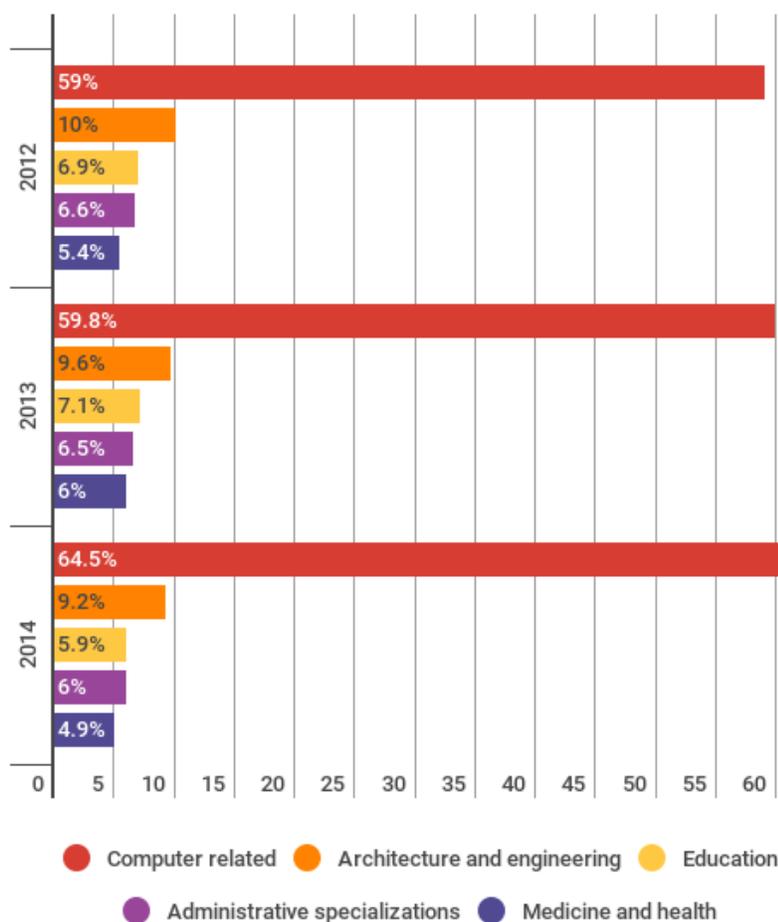
H-1B Job Breakdown by Positions Certified by USDOL: 2013



Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2013 Annual Report, p. 38, available at https://www.foreignlaborcert.doleta.gov/pdf/OFLC-2013_Annual_Report.pdf

The next biggest industries are engineering and architecture, followed by positions in administration.¹²⁸ While the IT sector dwarfs the H-1B program, there are also many entry-level jobs that appear to span a wide variety of industries and professions.

Top Five H-1B Jobs by Nonimmigrant Petitions Approved 2012-2014



Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report (March 24, 2014), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/H-1B_Characteristics_Report_FY_2013_826_KB.pdf.; Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2013 Annual Report (March 24, 2014), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/H-1B_Characteristics_Report_FY_2013_826_KB.pdf.; Source: U.S. Department of Homeland Security, USCIS, Characteristics of H-1B Specialty Occupation Workers, FY 2014 Annual Report (February 26, 2015), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1B-characteristics-report-14.pdf>.

2. DROP IN EDUCATION JOBS

H-1B jobs in education have never occupied a large percentage of this visa category. In 2011, only 6.7% of H-1B workers were college and university professors and just 1.9% of workers were secondary, primary and pre-k teachers.¹²⁹ In 2012, however, those percentages dropped even further to 4.9% for professors and less than 1% for secondary and primary school teachers, who did not even make it on the chart in USCIS's annual report.¹³⁰

3. COMPENSATION DATA

Because the H-1B specialty visa program is geared toward professional occupations that require advanced degrees, salaries are considerably higher than in other nonimmigrant visa programs for lower-skilled jobs. USDOL publishes information from approved LCAs including salary levels by state. Various high skilled and in-demand foreign professionals, such as IT managers and medical personnel, command six-figure salaries. For example, in 2012, a software developer in San Francisco earned \$150,000, and a pharmacist in Ohio made \$141,000.¹³¹ However, H-1B visas run the gamut of professional occupations, and so do corresponding annual salaries. A kindergarten teacher in Portland, OR earned \$29,000; recreation workers in Colorado earned \$30,000; architects in New York City earned \$30,000; and rehabilitation counselors in Massachusetts earned \$26,250.¹³² Even though these salaries are tested against a prevailing wage standard, many H-1B workers remain underpaid. Jobs are easily mischaracterized as entry-level when in reality the nonimmigrant is experienced and should be paid at a higher rate. Sometimes, the worker is not paid the required wage despite what the LCA may indicate.

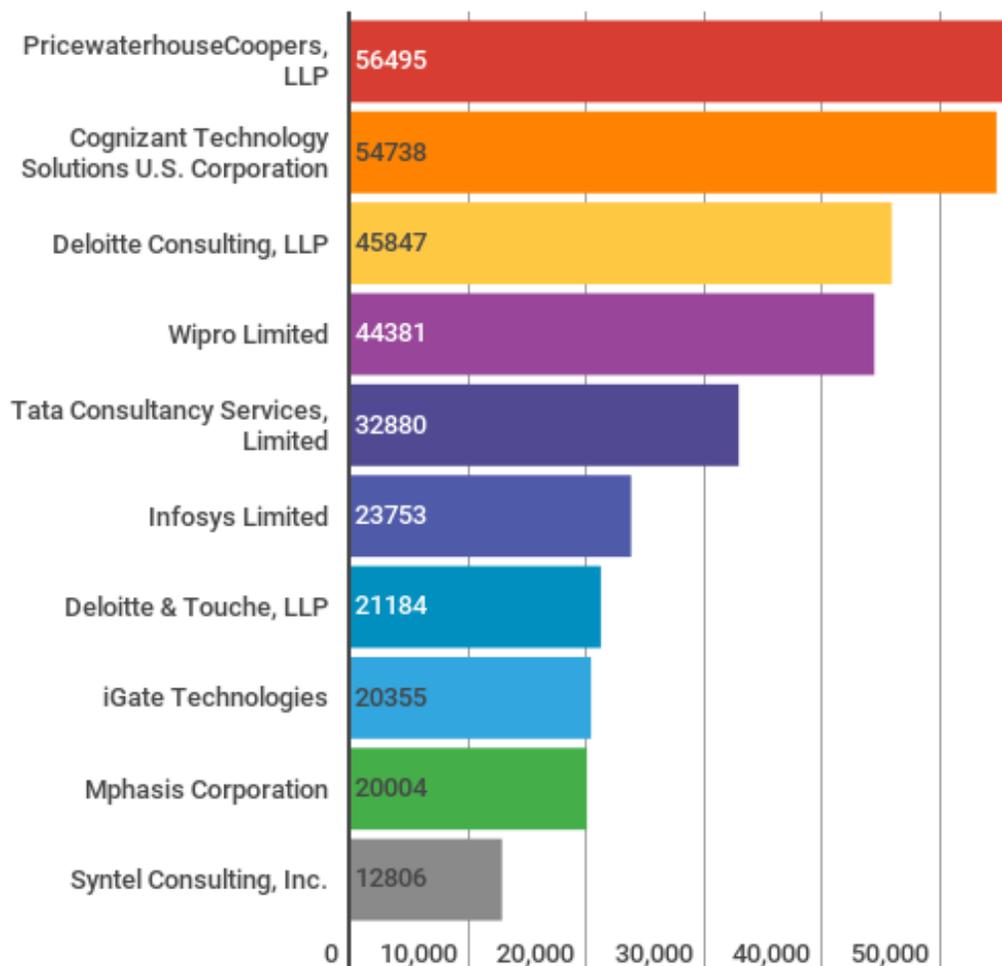
DIGGING DEEPER: MOST H-1B JOBS ARE ENTRY LEVEL

The U.S. Department of Labor (USDOL) has four different wage levels for the purposes of determining the required wage that an employer must pay an H-1B worker.¹³³ Entry level positions require workers to have a "basic understanding of duties and perform routine tasks requiring limited judgment."¹³⁴ In 2010, 54% of the Labor Condition Applications (LCA) that were approved by USDOL were for "entry-level" jobs.¹³⁵ Only 17 % of LCAs included positions at the two highest skill levels.¹³⁶ USDOL's [H-1B database](#) shows that the agency routinely certifies hundreds of company requests to employ foreign workers for under \$20 per hour.¹³⁷ For example, in the past H-1B visas for an interpreter with a construction company were approved at \$16 per hour, social workers, audio-visual specialists and quality control engineers were paid \$14 per hour, and cooks, pharmacist interns, veterinary technicians, and rehabilitation counselors were approved at \$11 per hour.¹³⁸

D. H-1B EMPLOYER DEMOGRAPHICS

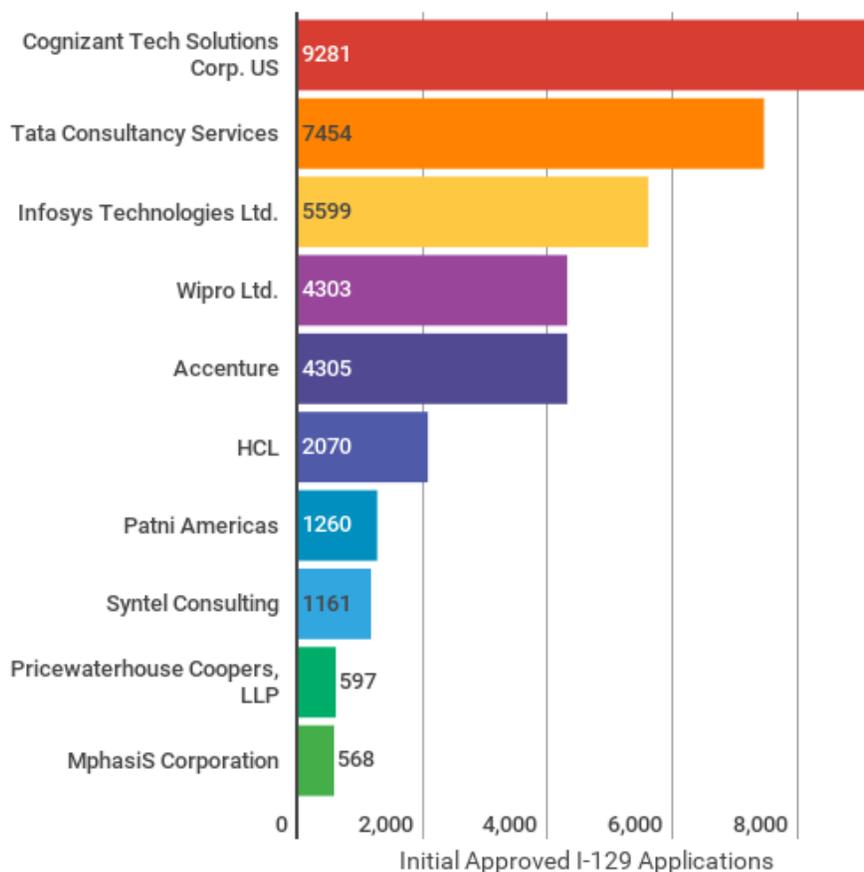
Given that STEM jobs are the most common in the H-1B program, it is not surprising that the largest H-1B employers are in the information technology arena. When including both new and continuing workers, Wipro, Ltd. came out ahead with 76,365 positions certified by USDOL in 2012.¹³⁹ That same year, Cognizant Technology was the largest employer of workers approved for initial employment.¹⁴⁰

Top Ten H-1B Employers by Positions Certified (USDOL): 2014



Source: U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program –Selected Statistics, FY 2014, available at http://www.foreignlaborcert.doleta.gov/pdf/H_1B_Selected_Statistics_FY2014_Q4.pdf.

Top Ten H-1B Employers for Initial Employment by Approved Nonimmigrant Petitions (USCIS) - 2012



A comprehensive listing of H-1B employers is not regularly published by USCIS. Data in this table was hand-tallied based on the H-1B companies list embedded in the following article: Farah Stockman, *Outsourced, At Home*, Boston Globe, March 31, 2013 available at <http://www.bostonglobe.com/opinion/2013/03/30/visa-program-has-been-hijacked-outsourcers/VAg6o9KgS2tuoZ3WbmaqeK/story.html>. As of December 2015 there is no 2013 or 2014 data available.

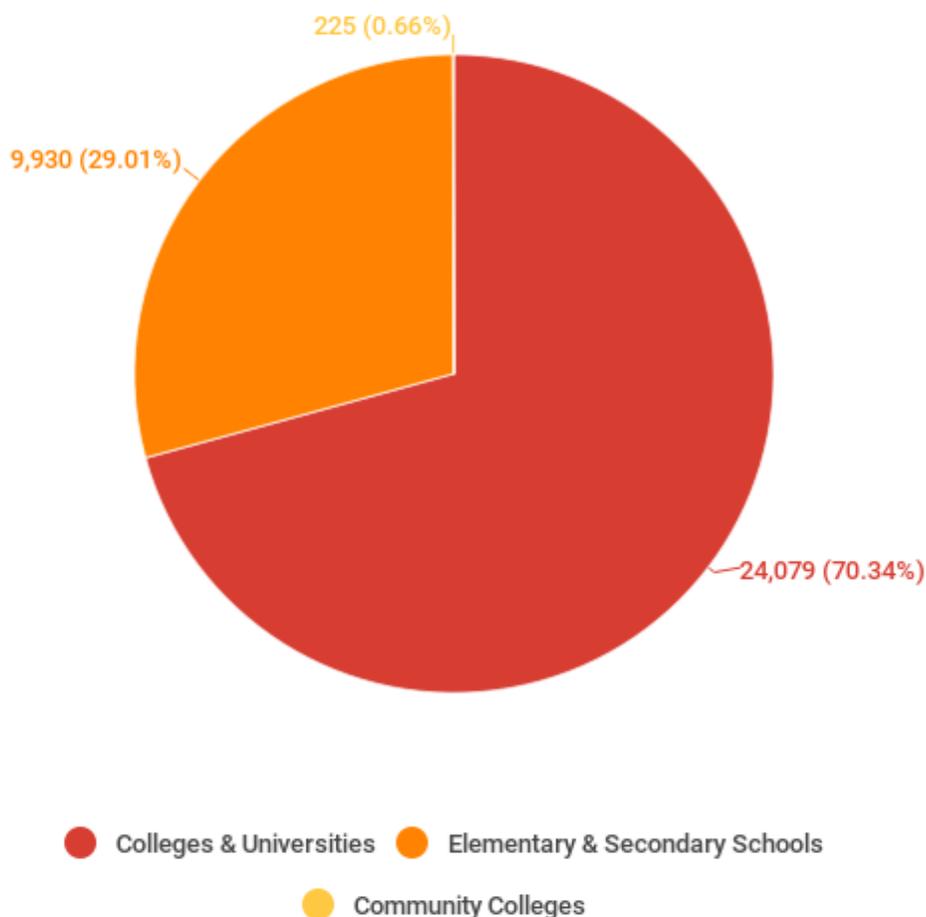
DIGGING DEEPER: BODY SHOP CLIENTS UNKNOWN

The top H-1B employers hire foreign workers as consultants who then work with various business clients.¹⁴¹ When multiple places of employment are to be involved, the employer must list them on the Labor Condition Application and on the Form I-129 petition.¹⁴² The U.S. Department of Labor does not publish these itineraries or the names of the business locations where H-1Bs are working. However, there are anecdotes about where H-1B workers are sent. For example, court pleadings in a case against Tata Consultancy Services shows that it sent H-1B workers to provide information technology services for Target, however Target is not listed in any of the data maintained by the federal agencies pertaining to H-1B workers.¹⁴³ Journalists have also revealed that companies such as AIG and Dun & Bradstreet have turned to temporary workers.¹⁴⁴

1. EDUCATIONAL EMPLOYERS

Most H-1B employers in the education field are colleges and universities. There are about half as many secondary and elementary school employers.

H-1B Educational Employer Breakdown: 2013

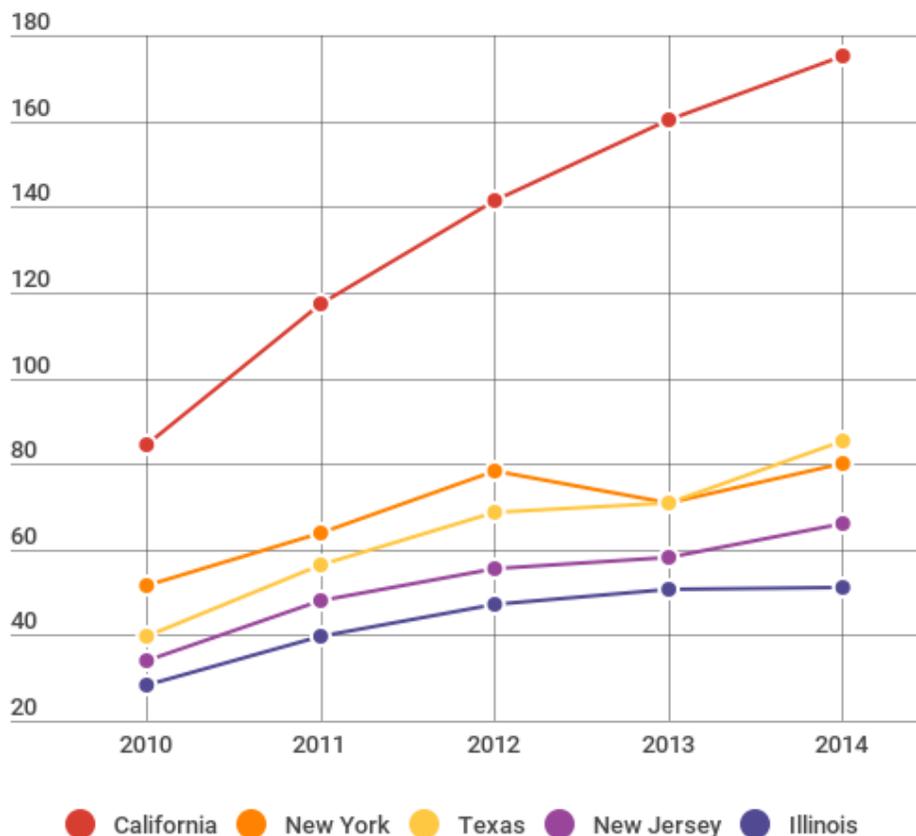


Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2011 Annual Report, available at <http://www.foreignlaborcert.USDOleta.gov/performancecdeta.cfm>.;
 Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2012 Annual Report, available at http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012_Annual_Report-11-29-2013-Final%20Clean.pdf.; Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2013 Annual Report, available at http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012_Annual_Report-11-29-2013-Final%20Clean.pdf. As of December 2015 there is no 2014 Annual Report available.

2. JOB LOCATION

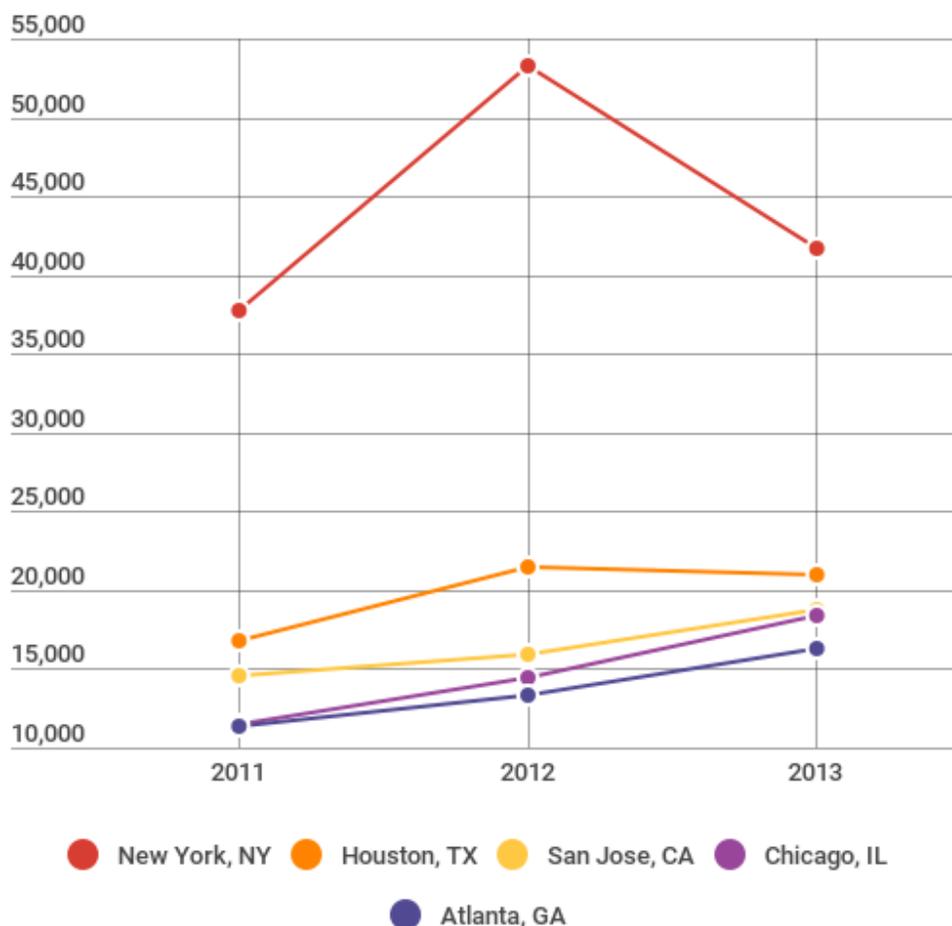
In 2014, the state with the most H-1B positions certified by USDOL was California, with 175,360.¹⁴⁵ Five states accounted for around 70% of all H-1B positions certified: California, New York, Texas, New Jersey and Illinois.

Top Five States by H-1B Positions Certified by USDOL 2010-2014



Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2011 Annual Report, available at <http://www.foreignlaborcert.USDOleta.gov/performance/cfm>. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistics, FY 2014, available at http://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q4.pdf. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistics, FY 2013, available at http://www.foreignlaborcert.doleta.gov/pdf/Statistics_FY%202013_YTD_Q4_final.pdf. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistic, FY 2012, available at http://www.foreignlaborcert.doleta.gov/pdf/h_1b_temp_visa_2012.pdf.

Top Five Cities by H-1B Positions Certified by USDOL 2010-2013



Source: U.S. Department of Labor, Office of Foreign Labor Certification – 2011 Annual Report, available at <http://www.foreignlaborcert.USDOLEta.gov/performance/cfm>. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistics, FY 2014, available at http://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q4.pdf. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistics, FY 2013, available at http://www.foreignlaborcert.doleta.gov/pdf/Statistics_FY%202013_YTD_Q4_final.pdf. U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistic, FY 2012, available at http://www.foreignlaborcert.doleta.gov/pdf/h_1b_temp_visa_2012.pdf.

IV. H-1B WORKERS' RIGHTS

The H-1B program regulations establish several worker protections. While there is a required fixed wage that must be paid to H-1B workers, there are no provisions for housing or inbound transportation. There are wage payment, recordkeeping, and work guarantee rules, including an explicit ban on shifting application fees to workers and a requirement that employers offer the same benefits to H-1B workers as to U.S. workers. H-1B workers are also protected by other federal or state employment statutes or common law rights that may apply, including but not limited to the Fair Labor Standards Act, the Age Discrimination Employment Act, Title VII of the Civil Rights Act, the Trafficking Victims Protection Act, the Racketeer Influenced Corrupt Organizations Act, and state wage and hour and discrimination laws. Whether specific statutes or common law rights apply to any given worker will depend on the facts of each particular situation.

A. TRANSPORTATION COSTS

H-1B program regulations do not generally require employers to pay for a worker's inbound or outbound travel expenses. However, employers must pay for outbound travel when a worker is dismissed prior to the end of the certified work period.¹⁴⁶ If the employer fronts the cost of travel to the U.S., that cost may only be deducted from the H-1B worker's paycheck if he or she voluntarily agrees in writing ahead of time.¹⁴⁷

B. REQUIRED WAGE

H-1B workers must receive "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or . . . the prevailing wage level for the occupational classification in the area of employment, whichever is greater."¹⁴⁸ [The U.S. Department of Labor \(USDOL\) reviews the required wage](#) when the labor condition application is approved. The wage must be paid for the entire time period certified in the application.

1. DEDUCTIONS

Any unauthorized deduction taken from wages is considered to be non-payment of that amount of wages.¹⁴⁹ [Unauthorized deductions include](#) money for any of the H-1B program fees, including employer's business expenses, such as attorney fees related to the H-1B application and processing, tools and equipment, travel expenses for the job, or penalties for not completing the work period.¹⁵⁰ Deductions are only permissible when they are required by law, such as income taxes, or reasonable and customary, such as insurance premiums, or voluntarily authorized by the worker.¹⁵¹ Valid deductions must be in writing and not exceed the fair market value or actual cost of the item.¹⁵²

DIGGING DEEPER: NO SHIFTING H-1B PROGRAM FEES

Employers may not cause H-1B workers to pay any of the employer's business expenses. This includes all costs associated with the labor condition application filed with the U.S. Department of Labor and the petition for nonimmigrant worker filed with the U.S. Department of Homeland Security's U.S. Citizenship and Immigration Services, including attorney/agent fees.¹⁵³ Furthermore, if the employer depresses wages below the required amount by imposing on the worker any of the employer's business expenses(s), the amount is considered an unauthorized deduction from wages "even if the matter is not shown in the employer's payroll records as a deduction."¹⁵⁴

C. WAGE PAYMENT

Wage payment rules depend on whether the H-1B worker is paid on a salaried basis, or by the hour, piece-rate or commission. For salaried employees, wages are due in prorated installments paid no less often than monthly.¹⁵⁵ Educational employers may pay H-1B workers in disbursements over fewer than 12 months as long as the payment schedule is established practice that applies to everyone and the H-1B worker agrees to the compressed annual salary payments beforehand.¹⁵⁶ Hourly workers should be paid for all hours worked at the end of the employee's ordinary pay period.¹⁵⁷

D. WORK GUARANTEE

H-1B workers are protected with a work guarantee that requires payment for some non-productive time. Regulations require employers to pay H-1B workers when they are in "non-productive status" due to a decision by the employer or related to employment.¹⁵⁸ Examples of this so-called "benching" are a lack of assigned work or the employer's failure to secure a permit or license. In any case, the employer is required to pay their H-1B workers as if they were working. Salaried employees should receive the full amount due and hourly workers should be paid full-time at the required wage as listed on the labor condition application. Part-time workers should be paid at least the number of hours indicated on the nonimmigrant petition (Form I-129) and the LCA. Payment is not required if the H-1B worker misses work due to reasons that have nothing to do with an employer decision or when the employment relationship has been terminated.¹⁵⁹ For example, if a worker is on vacation, or caring for an ill relative or is unable to work because of illness or disability, the employer does not need to pay the worker as if they were working.¹⁶⁰

E. RECORDKEEPING

Employers must keep records that document that each H-1B worker has been paid the required wage.¹⁶¹ Payroll records for each worker must include his or her name, home address, occupation, rate of pay, total wages paid, the date of pay and pay period covered, any deductions, and documentation that the same benefits have been offered to H-1B workers as the employer offers to U.S. workers.¹⁶² If the worker is part-time or is paid on an hourly, piece-rate, or commission basis, the records must show the hours worked each day and each week.¹⁶³

F. SAME OFFER OF BENEFITS AS U.S. WORKERS

Employers must offer to H-1B workers the same benefits as are offered to their U.S. workers, “on the same basis, and in accordance with the same criteria.”¹⁶⁴ Whether the benefits are cash bonuses, stock options, paid vacations and holidays, health, life, disability and other insurance plans, or retirement and savings plans, employers may not “provide more strict eligibility or participation requirements” for H-1B workers than for similarly employed U.S. workers.¹⁶⁵ Indeed, “H-1B nonimmigrants are not to be denied benefits on the basis that they are “temporary employees” by virtue of their nonimmigrant status.”¹⁶⁶ An employer may offer greater or additional benefits to H-1B workers than are offered to similarly employed U.S. workers as long as “such differing treatment is consistent with the requirements of all applicable nondiscrimination laws.”¹⁶⁷ The rules are slightly different for multinational employers.¹⁶⁸

1. EXTRA DOCUMENTATION NEEDED

Employers are required to document that the benefits were offered to H-1B workers, and keep records of all eligibility and participation rule and how costs are shared.¹⁶⁹ Records should include a description of the benefit plans and “any rules the employer may have for differentiating benefits among groups of workers” as well as evidence as to what benefits are actually provided to U.S. workers and H-1B workers.¹⁷⁰

V. ENFORCEMENT

Three agencies may enforce H-1B program rules: the U.S. Department of Labor (USDOL), the U.S. Department of Homeland Security, or the U.S. Department of Justice.¹⁷¹ While the U.S. Department of State does not have enforcement authority, consular officials abroad are instructed to report any suspected violations to USDOL.¹⁷² If an H-1B worker claims any sort of discrimination, the Equal Employment Opportunity Commission may have the ability to enforce those rights. State attorney generals and agencies customarily will have the authority to enforce state laws that may apply. Workers themselves may enforce their own employment and civil rights through private litigation by filing a lawsuit in federal or state court as long as there is jurisdiction and a private right of action; workers do not have the power to enforce H-1B program regulations. However, as is the case with all foreign temporary workers, it is may be a challenge to find a lawyer willing to continue with the case after the migrants return home once their visas expire.

Examples of enforcement actions and cases highlight common problems with the H-1B program. Among them are employers who illegally charge H-1B workers for visa fees or recruitment costs, employers who do not provide jobs even after hiring workers, employers who place workers in different jobs than what is described in the Labor Condition Application, and employers who fail to pay the prevailing wage.¹⁷³ Despite the success of some enforcement actions, there are problems with the scheme generally. Several Government Accountability Office studies have criticized the various federal agencies for “fragmented and restricted” oversight.¹⁷⁴ Furthermore, remedies do not always inure benefits to the workers. Civil money penalties are paid to the government, for example. And while debarring an exploitative employer may be necessary to stop future abuse, in such a case the victimized workers lose their immigration status and must return home unless they have been lucky enough to line up a new employer to petition for them. Even though some private lawsuits have won money for workers, there are limits to their efficacy.

A. U.S. DEPARTMENT OF LABOR

USDOL’s [Wage and Hour Division is responsible for enforcing](#) H-1B regulations and the Labor Condition Application (LCA).¹⁷⁵ “Any aggrieved person or organization” may [complain to USDOL](#) within 12 months after the date of the apparent violation.¹⁷⁶ However, complaints are rare. In 2009, for example, “only 664 out of 51,980 companies approved to hire new or extending H-1B workers had complaints against them.”¹⁷⁷ The USDOL may also initiate its own investigation at random when the employer is a willful violator, or when there is reasonable cause for an investigation.¹⁷⁸

If USDOL finds that an employer has violated the LCA, it may seek back wages owed to the workers, impose civil money penalties, which are paid to the U.S. Treasury, debar the employer from hiring nonimmigrants in the future, and pursue other appropriate relief.¹⁷⁹ False statements in an LCA may result in up to five years in prison and a \$10,000 fine. In April 2013 there were 31 employers on the H-1B barred/disqualified

list.¹⁸⁰ USDOL's Inspector General has challenged the agency to more effectively use its debarment authority within the foreign labor certification programs.¹⁸¹

1. RETALIATION PROHIBITED

The H-1B program prohibits retaliation. Immigration law states that H-1B employers may not:

intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.¹⁸²

Workers who complain about employer retaliation and are otherwise eligible to remain and work in the U.S. are able to "to seek other appropriate employment" until their current H-1B visa expires.¹⁸³ If USDOL finds that an employer has violated this anti-retaliation provision, it may impose fines of up to \$5000 per violation and a 2-year ban preventing the employer from importing H-1B workers. However, aggrieved workers may not file their own case and seek money damages on their own behalf, based only on an employer's violation of the H-1B regulations.¹⁸⁴

DIGGING DEEPER: EXAMPLES OF USDOL ENFORCEMENT ACTIONS

There have been several U.S. Department of Labor (USDOL) enforcement actions on behalf of H-1B workers that illustrate common problems. In 2011, Global Teachers Research and Resources Inc. paid nearly \$78,000 in back wages to 22 H-1B teachers in Georgia.¹⁸⁵ That same year in Maryland, a school district owed \$5.9 million in penalties and back wages to more than 1,000 teachers who had been required to pay visa processing and recruitment fees that should have been paid by the school district.¹⁸⁶ USDOL prohibited the district from participating in the H-1B program for two years.¹⁸⁷

In 2010, USDOL found that over 100 H-1B IT workers "were not paid any wages at the beginning of their employment, were paid on a part-time basis despite being hired under a full-time employment agreement, and were paid less than the prevailing wage."¹⁸⁸ Later that same year, USDOL ordered another software company to pay over \$700,000 in back-wages, penalties and interest for violating dozens of their H-1B workers' rights, and debarred it from participating in the H-1B program for one year.¹⁸⁹

2. THREAT OF DEBARMENT DISSUADES WORKER COMPLAINTS

When USDOL debar an employer from participation in the H-1B program, the workers lose their jobs and their immigration status. Just the threat of this remedy creates a disincentive for workers to complain about their H-1B jobs. Enforcement efforts are

undermined when workers do not want to come forward if there is any chance that they will lose their job. This is especially true when the workers have paid recruitment fees and other costs to be able to get the H-1B job and come to the U.S. in the first place. Receiving an award of back wages offers little comfort to workers who may no longer work in the United States.

DIGGING DEEPER: CRITICISM OF USDOL ENFORCEMENT

The U.S. Department of Labor's (USDOL) enforcement authority in the H-1B program is limited in several ways. Investigations are usually only triggered by complaints.¹⁹⁰ The agency cannot compel employers to cooperate with an investigation.¹⁹¹ There are no unannounced on-site inspections. The Government Accountability Office has urged Congress to provide USDOL with a broader mandate to enforce the law.¹⁹²

B. U.S. DEPARTMENT OF HOMELAND SECURITY

The U.S. Department of Homeland Security (DHS) has a special [Office of Fraud Detection and National Security](#) (FDNS) that is funded by anti-fraud fees.¹⁹³ The FDNS is DHS's "primary conduit for information-sharing with law enforcement and intelligence agencies."¹⁹⁴ It was created after an internal DHS fraud study recommended that the agency focus on prosecuting employers who exploit their workers and engage in visa fraud.¹⁹⁵ When appropriate, FDNS refers matters to DHS's U.S. Immigration and Customs Enforcement for investigation.

1. ADMINISTRATIVE SITE VISIT AND VERIFICATION PROGRAM

FDNS developed the Administrative Site Visit and Verification Program (ASVVP), where field officers conduct site inspections to verify information, and identify fraud cases.¹⁹⁶ Employers must acknowledge on their H-1B petition that there may be a DHS audit or inspection of their workplace.¹⁹⁷ During inspections, FDNS relies on interviews and document checks to ensure that the employer is legitimate and that H-1B workers are laboring under the terms stated on the Form I-129 petition.¹⁹⁸ In 2009, FDNS conducted 5,191 visits.¹⁹⁹ In 2010, the FDNS "oversaw 14,433 H-1B site inspections, which resulted in 1,176 adverse actions."²⁰⁰ According to USCIS, the fraud rate has been falling. A 2008 study found 20% fraud rate among H-1B visa petitions; by 2011, it was down to 7%.²⁰¹

DIGGING DEEPER: U.S. DEPARTMENT OF JUSTICE CRIMINAL PROSECUTIONS

There have been criminal cases prosecuting employers for mistreating H-1B workers. For example, in October 2010, Vision Systems Groups, Inc. and two executives pleaded guilty to felony charges.²⁰² The body shop employer created a shell company to obtain H-1B visas for workers to have jobs in Iowa, but sent them to worksites in other states and then did not pay them what they were owed.²⁰³

C. PRIVATE LITIGATION

H-1B workers do not have the legal authority to enforce H-1B program regulations in court. However, to the extent that there is an enforceable employment contract, applicable federal or state statute, or common law claim, H-1B workers may file a

lawsuit to enforce their rights and have their day in court in just like any other U.S. worker.

DIGGING DEEPER: H-1B CASES ILLUSTRATE WAGE ISSUES

Two lawsuits illustrate problems in the H-1B program. In December 2012, a federal jury ordered a recruiter to pay [\\$4.5 million to more than 350 H-1B teachers](#) from the Philippines. The workers taught in Louisiana public schools and were forced into exploitive contracts by their recruiters.²⁰⁴ Upon receiving their H-1B visas in the Philippines, the recruiters confiscated the teachers' passports and extorted up to \$16,000 in recruitment fees, commissions, and rents from them. In order to pay the recruitment fees, most of the teachers had to borrow money at high interest rates and had to use a large percentage of their income to pay down the debt. The recruiters threatened the teachers with deportation if they complained. The plaintiffs alleged fraud, negligence, human trafficking, and racketeering, among other violations.²⁰⁵ The Philippine government took action to revoke the recruiting license of PARS and ordered it to pay ten Filipino teachers.²⁰⁶

In April 2013, a [\\$29.7 million settlement for thousands of H-1B workers](#) from India was approved in a [class action lawsuit](#) against their former employer, Tata America Intl. Corporation.²⁰⁷ Essentially, the workers alleged they were victims of wage theft when their employer made unauthorized deductions from the workers' paychecks and required the workers to endorse and hand over their tax refund money.²⁰⁸

1. ACCESS TO COUNSEL

H-1B workers may have a problem finding a lawyer's assistance due to language or cultural differences. Generally, cases for temporary foreign workers present logistical challenges when clients have to return home while matters are pending. However, because most H-1B workers have college degrees and work in urban areas, their access issues are not as serious as those faced by their lower-wage, unskilled counterparts in other visa programs such as H-2A, H-2B, and J-1.

A) LEGAL SERVICES LAWYERS

Federally funded lawyers may represent individuals with an income below a certain financial level (usually between 125-200% of the federal poverty guideline depending on the legal services organization) and only certain classes of immigrants.²⁰⁹ In many cases individuals with H-1B visas will not be eligible for legal services because of these immigration and financial restrictions. However, there are exceptions when the worker is a victim of domestic violence, sexual assault, human trafficking, fraud in foreign labor contracting or another crime.²¹⁰ Such trafficking does occur, as seen in the case that came to light in 2014 of over [300 teachers from the Philippines](#) being lured to the U.S. on false promises and then forced to pay exorbitant and illegal recruitment fees by taking out [high interest debt](#).

VI. H-1B WORKERS IN THE U.S. – ISSUES

Issues involved with the H-1B program concern both the treatment of foreign workers and the effect of their employment on U.S. workers. With regard to foreign workers, underpayment of wages and illegally requiring recruitment fees are the biggest issues. Furthermore, when a worker's immigration status is tied to one single employer, the relationship is ripe for abuse. Concerning the effect on U.S. workers, studies continue to show that claims of a labor shortage are not well founded. Indeed, there is high unemployment among college graduates in the information technology industry, a sector of the economy that employs the greatest percentage of H-1B nonimmigrants.

A. WAGE UNDERPAYMENT

Evidence of H-1B worker wage underpayment has been a longstanding concern.²¹¹ Even back in 1996 an Inspector General report found that 75% of H-1Bs were “working for employers who did not adequately document the proper wage” on the Labor Condition Application (LCA) and “when the actual wage could be determined, 19 percent of the H-1B workers were paid less than the wage specified on the LCA.”²¹² In the computer-related industry, which has been extensively studied, many H-1B workers still earn less than similarly situated U.S. workers.²¹³ Some employers even admit to hiring H-1B workers “in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wage.”²¹⁴

Furthermore, wage underpayment results in lower wages across the board. One study based on data accumulated from 156,000 information technology workers at 7,500 U.S. companies found that the H-1B workforce results in a 5-6% wage decrease for computer programmers, system analysts and software engineers overall.²¹⁵

B. JOB TIED TO IMMIGRATION STATUS

Similar to other temporary work visas, an H-1B worker's immigration status is tied to the particular employer that petitioned the government for permission to hire him or her. This creates a vulnerable situation for the worker. Because the employer “controls the visa process, employees can feel forced to remain silent about unequal pay or else risk their immigration status.”²¹⁶

An H-1B worker may change jobs if a new employer has had both a Labor Condition Application (LCA) approved by the U.S. Department of Labor and a nonimmigrant petition Form I-129 approved by the U.S. Citizenship and Immigration Services (part of the U.S. Department of Homeland Security).²¹⁷ The LCA and Form I-129 must be filed before the current authorized stay expires.²¹⁸

However, if an H-1B worker is in the process of adjusting their status to become a Lawful Permanent Resident (LPR) with an employment-based visa through their current employer, the worker may not change jobs. Indeed, when an employer begins the process of changing the H-1B worker's status to an LPR, the worker must continue

employment until the new status is approved. The process usually takes several years depending on the visa wait times.²¹⁹ Changing employers during the process results in starting over and losing the time already spent waiting for approval. Of course, this situation is not unique to H-1B workers. Most all employment-based immigration applications depend on a particular employer demonstrating to the U.S. government that a particular worker is needed. Once workers receive LPR status, however, they are free to find work wherever they want.

DIGGING DEEPER: PENALTIES FOR QUITTING THE JOB EARLY

Changing jobs is especially difficult when an employer imposes a penalty for leaving the job before the end date stated on the Labor Condition Application approved by the U.S. Department of Labor. Rules about penalties for quitting are complicated. Generally, employers are barred from imposing a penalty on H-1B workers who quit.²²⁰ However, bona fide liquidated damages may be collected from a worker who leaves early.²²¹ These damages may include any business expenses (including attorneys' fees), except application fees.²²² The regulations explain that state law determines whether the penalty imposed is allowable liquidated damages or a prohibited penalty. Factors usually include whether the amount was stipulated to in an employment contract, and whether the amount is a reasonable estimate of actual damage caused by the worker's early departure.²²³ However, if the damages clause "cloaks oppression" it may be prohibited.²²⁴ Regardless of whether the penalty is technically "liquidated damages" and therefore lawful, imposing costs for leaving early surely impedes free job movement.

C. EXISTENCE OF LABOR SHORTAGE QUESTIONED

Critics of the H-1B program claim there are plenty of qualified U.S. workers who are willing to work.²²⁵ Within the information technology sector specifically, data show a robust supply of U.S. labor.²²⁶ Some report that U.S. workers in computer jobs have simply been replaced with Indian contractors.²²⁷ These anecdotes support the claim that it is simply "a matter of money, after all, not a shortage of workers. Employers want cheap labor, and... that desire is fulfilled by the H-1B program."²²⁸ The fact that employers generally are not required to recruit U.S. workers before seeking approval for H-1B workers is telling. By not setting up a labor market test prior to importing foreign workers, Congress has sent the message that whether there is a labor shortage is actually not very important.

D. DISCRIMINATION AGAINST U.S. WORKERS

In 2003, the Government Accountability Office studied the matter and argued that better tracking was needed to determine the effect of H-1B workers on U.S. workers. The longstanding concern has been that employers hire nonimmigrant workers simply because they are less expensive long term.²²⁹ This may be because of wage underpayment, or because employers prefer younger workers because they are cheaper long term.²³⁰ As a result, not only are there reports of employers replacing U.S. workers with H-1B workers,²³¹ but there is also discrimination in hiring. For example, in 2013, the U.S. Department of Justice found that Avant Healthcare Professionals posted online job openings with language "impermissibly preferring foreign-trained individuals" under the H-1B visa program over U.S. workers.²³²

ENDNOTES

¹ 8 U.S.C. § 1101(a)(15)(H)(1)(B), 8 U.S.C. § 1182(n). H-1B visas are also appropriate for fashion models of distinguished merit and ability. This Visa Page does not delve into issues involved with fashion models. For a discussion of the history of hiring foreign fashion models, with criticism and suggested policy changes, see Kit Johnson, *Importing the Flawless Girl*, 12 Nevada Law Journal 831 (Summer 2012).

² 8 C.F.R. § 214.2(h)(4)(iii)(D).

³ U.S. Department of Labor, *Strategic Plan: Fiscal Years 2006-2011*, at 35, (2006) (“H-1B workers may be hired even when a qualified U.S. worker wants the job, and a U.S. worker can be displaced from the job in favor of the foreign worker”), available at <http://www.scribd.com/doc/1628441/Department-of-Labor-strat-plan-20062011>. While this strategic plan has been updated, the underlying law has not.

⁴ R. Wasem, *Immigration of Foreign Workers: Labor Market Tests and Protections*, at 17, Congressional Research Service (Dec. 20, 2010), available at http://digitalcommons.ilr.cornell.edu/key_workplace/817/.

⁵ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); for a thorough listing of legislative history of the H-1B program see also GAO-11-26, Appendix V., at 100-102.

⁶ N. Matloff, *On The Need for Reform of the H-2B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 Univ. of Mich. Journal of Law Reform 1, at 4 (2003). The original language of the H-1 category which was replaced was for any nonimmigrant “of distinguished merit and ability and who is coming temporarily to the United States to perform services (other than services as a registered nurse) of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or non-profit private educational or research institution or agency in the United States to teach or conduct re- search, or both, at or for such institution or agency.” See Pub. L. 101-649, § 205(c)(1) (1990).

⁷ *Id.*

⁸ *Id.*, citing to C. Potamianos, *The Temporary Admission of Skilled Workers to the United States under the H-1B Program: Economic Boom or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L. J. 789, 796 (1997).

⁹ *Id.* at 5.

¹⁰ Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, tit. III, § 303(a)(7)(B)(iii), 102 Stat. 1742, 1747, codified at 8 U.S.C. § 1182(n)(1)(G).

¹¹ American Competitiveness and Workforce Investment Act of 1998 (“AWCIA”), Pub. L. No. 105-277, Title VI (1998).

¹² Matloff, 36 Univ. of Mich. Journal of Law Reform at 11.

¹³ *Id.* at 11-12. The study commissioned by the 1998 law was completed in 2000 and found that “H-1B workers indeed tended to be paid less than comparable Americans, and that older IT workers indeed faced major obstacles in finding work in the field, even during boom times.”

¹⁴ American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313 § 102, 14 Stat. 1251 (2000). See 8 U.S.C. § 1184(g)(1)(A) for a list of the annual cap history.

¹⁵ H-1B Visa Reform Act of 2004, Consolidated Appropriations Act, Pub. L. 108-447, § 425 (2005).

¹⁶ H-1B Visa Reform Act of 2004 § 426 (2005).

¹⁷ The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, § 1611 (2009) mentions the H-1B program insofar as employers receiving TARP funding may not hire H-1B workers unless the requirements for H-1B dependent employers in 8 U.S.C. § 1182(n)(3) are met.

¹⁸ In the context of 2013 Comprehensive Immigration Reform efforts, technology companies continue to execute sophisticated lobbying campaigns, including bankrolling television ads for both Republican and Democratic Senators. E. Lipton and S. Sengupta, *Latest Product from Tech Firms: An Immigration Bill*, New York Times (May 4, 2013) (“Senate negotiators acknowledged was extraordinary access by American technology companies to staff members who drafted the bill.”).

¹⁹ Matloff, 36 Univ. Of Mich. Journal Of Law Reform at 8, fn. 32, citing to Information Technology Association of America (ITAA), *Help Wanted: The IT Workforce Gap At The Dawn Of A New Century* (1997) and S. Anderson, *The Global Battle for Talent and People*, Immigration Policy Focus, American Immigration Law Foundation (Sept. 2003), available at <http://www.aifl.org/ip/ipf0903.asp>

²⁰ *Id.*, fns. 34-37, citing R. Lerman, Urban Institute, *High-Tech Worker Shortages and Immigration Policy: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 78 (Feb. 25, 1998).

²¹ The annual cap was temporarily raised to 195,000. American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313 § 102, 14 Stat. 1251 (2000).

²² Matloff, 36 UNIV. OF MICH. JOURNAL OF LAW REFORM at 12.

²³ *Id.* at 13, citing *Committee To Address Bill Eliminating H-1B Cap*, National Journal Technology Daily (May 5, 2000) and L. Nelson, *Pols Are Going Overboard On Visa Program*, N.Y. Daily News (May 3, 2000).

²⁴ 8 C.F.R. § 214.2(h)(13)(i)(A) (However, “the beneficiary may not work except during the validity period.”).

- ²⁵ 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(15)(ii)(B)(1). Some workers are exempt from the 6-year maximum period of admission and may stay for longer. American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No. 106-313, 114 Stat. 1251.
- ²⁶ 8 C.F.R. § 214.2(h)(13)(iii)(A); 9 FAM 402.10-13(A).
- ²⁷ 8 C.F.R. § 214.2(h)(16).
- ²⁸ U.S. Department of Homeland Security, *Permanent Workers*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7...>. The USCIS website has a page dedicated to each of the five employment based visa (green card) categories.
- ²⁹ U.S. Department of State, *The Operation of the Immigrant Numerical Control System*, available at https://travel.state.gov/content/dam/visas/Immigrant%20Visa%20Control%20System_operation%20of.pdf.
- ³⁰ See generally 8 C.F.R. § 214.2(h)(15), (16).
- ³¹ The fiscal year runs from October 1 through September 30.
- ³² 8 U.S.C. § 1184(g)(1)(A)(vii); 9 FAM 402.10-10(A)a.(1)(a).
- ³³ American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, §§ 102- 106, 114 Stat. 1251, 1251-55, codified at 8 U.S.C. § 1184(g)(5)(A),(B).
- ³⁴ H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, div. J, tit. IV, subtit. B, §§ 422, 424 and 425(a) 118 Stat. 3353, 3353-56, codified at 8 U.S.C. § 1184(g)(5)(C).
- ³⁵ United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402(b)(2)(B), 117 Stat. 909, 940 (2003) and the United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 402(1), 117 Stat. 948, 970-71; 9 FAM 402.10-5(B).
- ³⁶ S.153 – 114th Congress (2015-2016), the Immigration Innovation Act of 2015, introduced in the Senate on 1/13/15, available at <https://www.congress.gov/bill/114th-congress/senate-bill/153>.
- ³⁷ C.F. P. Thibodeau, ComputerWorld, “New H-1B bill will ‘help destroy’ U.S. tech workforce” (Jan. 2015), available at <http://www.computerworld.com/article/2868428/it-industry/new-h-1b-bill-will-help-destroy-us-tech-workforce.html>; P. Thibodeau, ComputerWorld, “Grassley’s position on H-1B called ‘protectionist’” (Feb. 2015), available at <http://www.computerworld.com/article/2889734/it-outsourcing/grassleys-position-on-h-1b-called-protectionist.html>.
- ³⁸ “S. 153 – 114th Congress: I-Squared Act of 2015.” www.GovTrack.us. 2015. January 30, 2017, available at <https://www.govtrack.us/congress/bills/114/s153>;
- ³⁹ United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402(b)(2)(B), 117 Stat. 909, 940 (2003) and the United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 402(1), 117 Stat. 948, 970-71; 9 FAM 402.10-5(B).
- ⁴⁰ 9 FAM 402.10-5(H) (describing visa application procedures for prospective H-1B1 workers).
- ⁴¹ 9 FAM 402.10-5(C).
- ⁴² 9 FAM 402.10-14(B).
- ⁴³ 8 C.F.R. § 214.2(h)(9)(iv); 9 FAM 402.10-14(C).
- ⁴⁴ U.S. Department of Homeland Security, USCIS, *Employment Authorization for Certain H-4 Dependent Spouses*, available at <http://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses> (December 2015).
- ⁴⁵ *This includes H-1B, H-2A, H-2B, and H-3 as principals. See U.S. Department of State, FY 1997-2014 NIV Detail Table*, available at <http://www.travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>.
- ⁴⁶ 20 C.F.R. §§ 655.700-655.760; see also 20 C.F.R. § 655.730(a) (An employer, or the employer’s authorized agent or representative, which meets the definition of “employer” set forth in § 655.715 and intends to employ an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.)
- ⁴⁷ 20 C.F.R. § 655.720.
- ⁴⁸ 20 C.F.R. § 655.730(c)(4); see also 20 C.F.R. § 655.715 (defining place of employment).
- ⁴⁹ 20 C.F.R. §§ 655.736-655.739.
- ⁵⁰ 8 U.S.C. § 1182(n)(1).
- ⁵¹ 20 C.F.R. § 655.734(a)(3).
- ⁵² 8 U.S.C. § 1182(n)(1)(A)(i).
- ⁵³ See discussion of H-1B wages included in U.S. Department of Labor, OFLC Frequently Asked Questions and Answers, available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h1b1> (December 2015).
- ⁵⁴ 20 C.F.R. § 655.731(a).
- ⁵⁵ Government Accountability Office, *H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security*, No. 06-720, at 3, (June 2006) (hereinafter GAO-06-720). This GAO report claims that a review of nearly 1 million applications found that 3,229 H-1B workers were earning less than the prevailing wage.

⁵⁶ U.S. Department of Homeland Security, USCIS, *H-1B Benefit Fraud & Compliance Assessment*, at 5 (Sept. 2008), previously available at http://www.uscis.gov/files/native/documents/H-1B_BFCA_20sep08.pdf, currently available at <http://h1blegalrights.com/wp-content/uploads/2008/12/h1b-report-fraud.pdf>.

⁵⁷ J. Gans, E. Replagle, D. Tichenor, Eds., *Debates on U.S. Immigration*, p. 277-78 (Sage Publishing 2012); see also Dawn Kawamoto, *How 800,000 H-1B Workers Came to the U.S.*, (May 14, 2013) (“In other words, the prevailing wage doesn’t take into account the salaries of people working in hot jobs like iOS or Android developer compared to those working with more traditional platforms.”), available at <http://news.dice.com/2013/05/14/how-nearly-800000-h-1b-workers-came-to-w...>

⁵⁸ *Id.* at 277.

⁵⁹ U.S. Department of Labor, ETA, *Prevailing Wage Determination Policy Guidance*, at 6-8, (May 9, 2005) (describing the LCA job assessment process), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁶⁰ Government Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, No. 11-26, p. 107 (January 2011) (hereinafter GAO-11-26).

⁶¹ 20 C.F.R. § 655.810(b)(3).

⁶² F. Stockman, *Outsourced, At Home*, Boston Globe (March 31, 2013) (discussing displacement of U.S. workers generally), available at <http://www.bostonglobe.com/opinion/2013/03/30/visa-program-has-been-hija...> (April 2013); D. Tennant, *Claim of 'Policies' to Displace U.S. Workers Is Destined to Backfire*, IT Business Edge (Nov. 2, 2011) (“It is a fact that there are documented cases in which American technology workers have been forced to train their H-1B replacements.”), available at <http://www.itbusinessedge.com/cm/blogs/tennant/claim-of-policies-to-disp...> (April 2013).

⁶³ M. Kaste, *Who's Hiring H-1B Workers? It's Not Who You Might Think*, All Tech Considered, NPR (April 3, 2013) (discussing displacement of U.S. workers in context of offshoring/outsourcing debate), available at <http://www.npr.org/blogs/alltechconsidered/2013/04/03/176134694/Whos-Hir...>

⁶⁴ 8 U.S.C. § 1182(n)(1)(G); 20 C.F.R. § 655.736 - 739.

⁶⁵ 8 U.S.C. 1182(n)(3)(A).

⁶⁶ GAO-11-26, at 19.

⁶⁷ 8 U.S.C. § 1188(b)(4); 20 C.F.R. 655.738(d).

⁶⁸ 8 U.S.C. § 1182(n).

⁶⁹ GAO-11-26, at 9.

⁷⁰ 20 C.F.R. § 655.736.

⁷¹ 20 C.F.R. § 655.737 and U.S. Department of Homeland Security, *Hiring a Foreign National for Short-Term Employment*, at 28, available at

https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Custom%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf.

⁷² U.S. Department of Labor, WHD, *H-1B Willful Violator List of Employers*, available at <http://www.dol.gov/whd/immigration/H1BWillfulViolator.htm> (February 2015).

⁷³ USDOL does not publish the total number of employers who seek H-1B workers in any given year. A single employer may file several applications in one year.

⁷⁴ 8 U.S.C. § 1182(n)(1)(G). See J. Rosenbaum, *Exploiting Dreams: H-1B Visa Fraud, Its Effects, and Potential Solutions*, 13 U. of Penn. Journal of Bus. Law, 797, 804 (May 2011) (“The LCA review process is completely automated, and the employer is not required to submit any supporting documentation.”)

⁷⁵ GAO-06-720, at 6.

⁷⁶ 20 C.F.R. § 655.705(c)(5) (The regulation does not provide examples of the sorts of challenges mentioned); 20 C.F.R. § 655.760 (listing documentation).

⁷⁷ U.S. Department of Labor, OIG, *Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs*, No. 06-03-007-03-321, at 4, (Sept. 30, 2003), available at <http://www.oig.dol.gov/public/reports/oa/2003/06-03-007-03-321.pdf>.

⁷⁸ U.S. Department of Labor, *Good jobs for everyone: Performance and Accountability Report, FY 2009*, at 274, available at <http://www.dol.gov/sec/media/reports/annual2009/2009highlights.pdf>.

⁷⁹ All historical data taken from Annual Performance Reports published by the U.S. Department of Labor, available at <https://www.foreignlaborcert.doleta.gov/performance/cfm> (December 2015). Approval rate equals positions certified divided by positions requested.

⁸⁰ U.S. Department of Labor, *H-1B Temporary Labor Specialty Occupations Labor Condition Program – Select Statistics, FY 2014*, available https://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q3.pdf.

⁸¹ 8 C.F.R. § 21.2(h)(4)(iv)(B).

⁸² 8 C.F.R. § 214.2(h)(2)(iii).

⁸³ All historical data taken from Annual Reports on H-1B Petitions published by the U.S. Department of Homeland Security, available at <http://www.uscis.gov/tools/reports-studies/reports-and-studies> (December 2015). Approval rate equals petitions approved divided by petitions filed.

⁸⁴ U.S. Department of Homeland Security, USCIS, *FY 2014 Annual Report: H-1B Petitions*, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2014_H-1B_Petitions_Report_SIGNED.pdf.

⁸⁵ See Form I-129 H-1B Checklist.

⁸⁶ Petitioners may choose to pay a voluntary \$1,225 premium fee to expedite the process.

⁸⁷ See H-1B Data Collection and Filing Fee Supplement, Form I-129, p. 17-19.

⁸⁸ 8 U.S.C. § 1182(n)(2)(C)(vi)(II) (violation for employer to require H-1B employee to reimburse or pay employer for fee; employer “may not accept” reimbursement from worker).

⁸⁹ 8 U.S.C. § 1184(c)(12)(A); see also U.S. Department of Labor, WHD Fact Sheet #62H.

⁹⁰ 20 C.F.R. § 731(c)(9) (attorney fees and other costs connected to the performance of H-1B program functions – including preparation and filing of LCA and H-1B petition – are business expenses of the employer); see also U.S. Department of Labor, WHD Fact Sheet #62H.

⁹¹ 20 C.F.R. §§ 655.731(c)(1) and 655.731(c)(9).

⁹² 20 C.F.R. § 655.731(c)(11)-(12) (“where the employer depresses the employee’s wages below the required wage by imposing on the employee any of the employer’s business expense(s)” is it considered “an unauthorized deduction from wages even if the matter is not shown in the employer’s payroll records as a deduction.”).

⁹³ 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) (“The request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.”). Amended or new petitions require new LCAs. See 8 C.F.R. § 214.2(h)(2)(i)(E).

⁹⁴ 20 C.F.R. § 655.705(c)(4).

⁹⁵ When multiple places of employment are contemplated, the USDOL regulations state that “[a]ll intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.” 20 C.F.R. § 655.730(c)(5).

⁹⁶ P. Chakravarty, *Weak Winners of Globalization: Indian H-1B Workers in the American Information Economy*, AAPI Nexus, Vol. 3, No. 2, p. 59, 64-67 (Winter 2005) (Describing first-hand exploitation of Indian H-1B employed by body shops).

⁹⁷ GAO-11-26, at 53-54 (noting 249 H-1B investigations in the Northeast Region during the time period 2006-2009, based on WHD data).

⁹⁸ GAO-11-26, at 2 (highlights); see Government Accountability Office, *H-1B Visa Program: Multifaceted Challenges Warrant Re-examination of Key Provisions*, Statement for the Record, at 12, (Mar. 31, 2011) available at <http://www.gao.gov/new.items/d11505T.pdf> (hereinafter GAO-11-505T).

⁹⁹ D. Neufeld, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements*, USCIS (Jan. 8, 2010) available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%2...>

¹⁰⁰ See 8 C.F.R. § 214.2(h)(4)(iii)(C) (beneficiary qualifications).

¹⁰¹ 9 FAM 402.10-9(A).

¹⁰² 9 FAM 402.10-7(A) and (B); see also GAO-11-26, at 47.

¹⁰³ U.S. Department of State, Nonimmigrant Visa Statistics, NIV Workload by Category, 2006-2014, available at <http://www.travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>. Adjusted Visa Refusal Rate = (Refusal – Overcome) / ((Refusal-Overcome) + Issuances). See U.S. Department of State, Guidelines of the Visa Waiver Program, available at <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html>.

¹⁰⁴ 8 U.S.C. §1225; 8 C.F.R. Part 235, Inspection of Persons Applying for Admission; see also A. Fragomen, Jr., A. Del Rey, Jr., and S. Bernsen, *Immigration Law and Business* § 2:11 (2010) (“The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry...The visa does not assure an alien that he or she will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).”).

¹⁰⁵ See 20 C.F.R. § 655.731(c)(9)(ii) (deductions from wages “may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition”).

¹⁰⁶ See, e.g., *Nunag-Tanedo v. East Baton Rouge Parish School Bd.*, Complaint, Case No. SA CV10-01172 (C.D. Cal., August 5, 2010) (detailing fees plaintiffs had to pay in violation of H-1B program rules), available at http://www.splcenter.org/sites/default/files/downloads/case/Filipino_tea...

¹⁰⁷ *Id.*

¹⁰⁸ See generally, Matloff, 36 Univ. of Mich. Journal of Law Reform at 11.

¹⁰⁹ U.S. Department of Labor, OFLC, *H-1B Temporary Visa Program – Selected Statistic, FY 2014*, available at https://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q4.pdf.

- ¹¹⁰ U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at <http://www.travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>.
- ¹¹¹ U.S. Department of Homeland Security, *Characteristics of H-1B Specialty Occupation Workers FY 2014 Annual Report* (February 26, 2015), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1B-characteristics-report-14.pdf> (hereinafter *USCIS FY14 Annual Report*).
- ¹¹² *Id.*
- ¹¹³ 8 U.S.C. § 1184, Note "Improving Count of H-1B and H-2B Nonimmigrants" American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105–277, div. C, title IV, §416(c)(2), Oct. 21, 1998, 112 Stat. 2681–655, amended by REAL ID 2005, Pub. L. 109–13, div. B, title IV, §406, May 11, 2005, 119 Stat. 320).
- ¹¹⁴ U.S. Department of Homeland Security, *Nonimmigrant Admissions by Class of Admission and Country of Citizenship: Fiscal Year 2013* (Supplemental Table 1), available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-nonimmigrant-admissions> (last visited March 2015).
- ¹¹⁵ *Id.*
- ¹¹⁶ Telephone and email correspondence with Office of Immigration Statistics employees, U.S. Department of Homeland Security (2011, 2013).
- ¹¹⁷ T. Robbins, *U.S. Aims To Track Foreigners Who Arrive, But Never Leave*, National Public Radio (May 1, 2013), available at <http://www.npr.org/2013/05/01/180338462/u-s-aims-to-track-foreigners-who...>.
- ¹¹⁸ U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at <http://www.travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>.
- ¹¹⁹ U.S. Department of Homeland Security, USCIS, *Annual Characteristics Reports*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD>. The numbers include nonimmigrant petitions for both initial and continuing employment.
- ¹²⁰ *Id.*
- ¹²¹ Note that Canadian citizens generally do not require a nonimmigrant visa in order to enter the United States. See <https://travel.state.gov/content/visas/en/visit/canada-bermuda.html>. For this reason, U.S. Department of State data revealing the nationality of individuals receiving visas does not include Canada. However, employers who want to hire H-1B workers from Canada must follow the same steps filing paperwork with USDOL and USCIS, and workers must present for admission at the border through CBP. Therefore, data from those agencies does include Canada.
- ¹²² U.S. Department of State, *FY 1997-2014 NIV Detail Table*, available at <http://www.travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html>.
- ¹²³ *USCIS FY14 Annual Report*.
- ¹²⁴ GAO-11-26, at 88-89.
- ¹²⁵ A. Parker, *Gender Bias Seen in Visas for Skilled Workers*, New York Times (March 18, 2013).
- ¹²⁶ *USCIS FY14 Annual Report*.
- ¹²⁷ GAO-11-26, at 34 (noting 42% of all H-1B jobs were in systems analysis and programming).
- ¹²⁸ *USCIS FY14 Annual Report*.
- ¹²⁹ *Id.* at 15.
- ¹³⁰ U.S. Department of Homeland Security, USCIS, *Characteristics of H-1B Specialty Occupation Workers FY 2012 Annual Report*, p. 15.
- ¹³¹ U.S. Department of Labor, OFLC, *Performance Data, LCA_Case_Data_FY2012.csv*, available at http://www.foreignlaborcert.doleta.gov/performance_data.cfm (June 2013).
- ¹³² *Id.*
- ¹³³ ETA Form 9035.
- ¹³⁴ GAO-11-26, at 58.
- ¹³⁵ See also GAO-11-26 at 97 (52% of jobs at skill level 1 in FY 2009).
- ¹³⁶ *Id.* (18% of jobs in FY 2009 were approved at skill levels 3 and 4 combined).
- ¹³⁷ U.S. Department of Labor, OFLC, *LCA_Case_Data_FY2012.csv*.
- ¹³⁸ *Id.*; see also U.S. Department of Labor, OFLC, *H-1B Case Data FY2010.mdb, 2010*, available at <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm> (last visited June 2013).
- ¹³⁹ U.S. Department of Labor, OFLC, *H-1B Temporary Visa Program – Selected Statistic, FY 2012*.
- ¹⁴⁰ F. Stockman, *Outsourced, At Home*, Boston Globe (March 31, 2013) (noting that the top four employers accounted for roughly one-fifth of all initial nonimmigrant petitions in 2012), available at <http://www.bostonglobe.com/opinion/2013/03/30/visa-program-has-been-hija...>.
- ¹⁴¹ R. Hira, *Top 10 users of H-1B guestworker program are all offshore outsourcing firms*, EPI blog (Feb. 14, 2013), available at <http://www.epi.org/blog/top-10-h1b-guestworker-offshore-outsourcing/>
- ¹⁴² 20 C.F.R. § 655.730(c)(5); 8 C.F.R. § 214.2(h)(2)(i)(F)(2).

¹⁴³ See, e.g., *Vedachalam v. Tata Consultancy Services, LTD*, Second Amended Class Action Complaint, Case No. C 06-0963 (N.D. Cal, filed Sept. 20, 2011).

¹⁴⁴ F. Stockman, *Outsourced, At Home*, Boston Globe (March 31, 2013) available at <http://www.bostonglobe.com/opinion/2013/03/30/visa-program-has-been-hija...>

¹⁴⁵ U.S. Department of Labor, Office of Foreign Labor Certification, H-1B Temporary Visa Program – Selected Statistic, FY 2014, available at http://www.foreignlaborcert.doleta.gov/pdf/H-1B_Selected_Statistics_FY2014_Q4.pdf.

¹⁴⁶ 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E).

¹⁴⁷ 20 C.F.R. § 655.731(c)(9)(iii); see also U.S. Department of Labor, WHD Fact Sheet #62H.

¹⁴⁸ 8 U.S.C. § 1182(n)(1)(A)(i).

¹⁴⁹ 20 C.F.R. § 655.731(c)(11).

¹⁵⁰ 20 C.F.R. § 655.731(c)(9)(ii) and (iii).

¹⁵¹ *Id.*

¹⁵² 20 C.F.R. § 655.731(c)(9)(iii).

¹⁵³ 20 C.F.R. § 655.731(c)(9)(ii).

¹⁵⁴ 20 C.F.R. § 655.731(c)(12).

¹⁵⁵ 20 C.F.R. § 655.731(c)(4).

¹⁵⁶ *Id.*

¹⁵⁷ 20 C.F.R. § 655.731(c)(5) (usually weekly, but in no event less frequently than monthly).

¹⁵⁸ 20 C.F.R. § 655.731(c)(7)(i)

¹⁵⁹ 20 C.F.R. § 655.731(c)(7)(ii)

¹⁶⁰ *Id.* The rules specify that employers must comply with their own benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) that may apply.

¹⁶¹ 20 C.F.R. § 655.731(b).

¹⁶² *Id.*

¹⁶³ 20 C.F.R. § 655.731(b)(v). Daily and weekly hours do not need to be included for salaried employees.

¹⁶⁴ 20 C.F.R. § 655.731(c)(3). Benefits received by H-1B workers “need not be identical to the benefits received by similarly employed U.S. workers(s), provided that the H-1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits.”

¹⁶⁵ 20 C.F.R. § 655.731(c)(3)(i) (“e.g., full-time workers compared to full-time workers; professional staff compared to professional staff”).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Multinational employers may choose to provide H-1B workers with “home country” benefits. See 20 C.F.R. § 655.731(c)(3)(iii)(C).

¹⁶⁹ 20 C.F.R. § 655.731(b).

¹⁷⁰ *Id.*

¹⁷¹ 8 U.S.C. §§ 1182(n)(1)(E) & (G), 1182(n)(5).

¹⁷² 9 FAM 402.10-17.

¹⁷³ 20 C.F.R. § 655.731(c)(7)(i); 8 U.S.C. § 1182(n)(2)(C)(vii)(I). See P. Thibodeau, *Widespread problems, fraud found in H-1B program*, Computerworld (Oct. 9, 2008), available at

http://www.computerworld.com/s/article/9116758/Widespread_problems_fraud... (USCIS fraud study); see also M.

Herbst, *Visa Fraud Sparks Arrests Nationwide*, Bloomberg Businessweek, (Feb. 13, 2009), available at

http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db20090212_9...

¹⁷⁴ GAO-11-26, at 45; GAO-11-505T.

¹⁷⁵ 20 C.F.R. § 655.800-855.

¹⁷⁶ 8 U.S.C. § 1182(n)(2)(A).

¹⁷⁷ GAO-11-26, at 48.

¹⁷⁸ 8 U.S.C. § 1182(n)(2)(F), and (G).

¹⁷⁹ 20 C.F.R. § 655.810. For example, if the employer makes unauthorized deductions from wages, USDOL may make a “back wage assessment plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful.” See 20 C.F.R. § 655.731(c) (11).

¹⁸⁰ U.S. Department of Labor, Wage and Hour Division, *H-1B Debarred/Disqualified List of Employers*, (April 30, 2013), available at <http://www.dol.gov/whd/immigration/h1bdebarment.htm>.

¹⁸¹ U.S. Department of Labor, Office of Inspector General, *Debarment Authority Should be Used More Extensively in Foreign Labor Certification Programs*, No. 05-10-002-03-321, (Sept. 30, 2010), available at

<http://www.oig.dol.gov/public/reports/oa/2010/05-10-002-03-321.pdf>.

¹⁸² 8 U.S.C. § 1182(n)(2)(C)(iv).

¹⁸³ 8 U.S.C. § 1182(n)(2)(C)(v); 20 C.F.R. § 755.801(c).

- ¹⁸⁴ 8 U.S.C. § 1182(n)(2)(C)(ii).
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